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In the Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether a bankruptcy court, in reorganization proceedings under Chapter 11 of the Bankruptcy Code, 11 U.S.C. (Supp. V) 1101 *et seq.*, may authorize a debtor-in-possession to reject a collective bargaining agreement without a threshold showing that the business is likely to fail unless the agreement is rejected.

2. Whether the National Labor Relations Board may properly find that a debtor-in-possession violated Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), by unilaterally changing the terms of a collective bargaining agreement during the period between filing of a Chapter 11 petition and entry of a court order authorizing rejection of the agreement.*

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* In addition to the parties listed in the caption, Local 408, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, participated in the proceedings below, as appellant in No. 81-2140, and as intervenor in No. 81-2238.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-26a) is reported at 682 F.2d 72. The decision and order of the National Labor Relations Board (App. C, *infra*, 29a-43a) is reported at 255 N.L.R.B. 1203. The oral opinions of the district court (App. D, *infra*, 44a-48a) and the bankruptcy court (C.A. App. 60a-66a) are unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 27a-28a) was entered on June 17, 1982. Pursuant to orders entered by Justice Brennan on Sep-

tember 3, 1982, and October 5, 1982, the time for filing a petition for a writ of certiorari was extended to and including November 14, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 2 of the National Labor Relations Act ("NLRA"), 29 U.S.C. (& Supp. IV) 152, provides in pertinent part:

> When used in this subchapter—
>
> (1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under title 11, or receivers.
>
> (2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly * * *.

Section 8 of the National Labor Relations Act, 29 U.S.C. 158, provides in pertinent part:

> **(a) Unfair labor practices by employer**
>
> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, or restrain, or coerce employees in the exercise of the rights guaranteed in section [7];
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees * * *.
>
> * * * * *
>
> **(d) Obligation to bargain collectively**
>
> For the purposes of this section, to bargain collectively is the performance of the mutual

obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

> (4) continues in full force and effect, without resorting to strike or lock-out, all of the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:
>
> The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) * * * shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. * * *

Section 365 of the Bankruptcy Code, 11 U.S.C. (Supp. V) 365, provides in pertinent part:

> (a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.
>
> * * * * *
>
> (g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease—
>
> (1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, or 13 of this title, immediately before the date of the filing of the petition * * *.

STATEMENT

1. Bildisco is a New Jersey partnership that sells and distributes building supply materials. Some of its employees are represented by Local 408, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("the Union"). The most recent collective bargaining agreement between Bildisco and the Union was effective from May 1, 1979, through April 30, 1982 (App. C, *infra*, 35a). Beginning in January 1980 Bildisco failed to meet certain obligations under the agreement, including payment of pension, health, and welfare contributions, payment of vacation benefits, and remittance to the Union of dues withheld from employees' pay. Beginning in May 1980 it refused to grant wage increases provided for in the agreement (*ibid.*). On April 14, 1980, Bildisco filed a petition for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. (Supp. V) 1101 *et seq.* (App. A, *infra*, 2a). After that date Bildisco operated its business as debtor-in-possession. During the summer the Union filed unfair labor practice charges with the National Labor Relations Board, and on July 31, 1980, the Board's General Counsel issued a complaint alleging that Bildisco had violated Section 8(a)(5) and 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and 158(a)(1), by unilaterally changing the terms of the collective bargaining agreement (App. A, *infra*, 4a-5a).

In December 1980, Bildisco filed a motion with the bankruptcy court requesting permission to reject the collective bargaining agreement with the Union (C.A. App. 1a). At the hearing on Bildisco's motion on January 5, 1981, the only witness was Sal Valente, a general partner of Bildisco. Valente testified that Bildisco's creditors were very concerned about the "union situa-

tion" at Bildisco and that if Bildisco could operate "non-union" it could save around $100,000 in wages and fringe benefits in 1981 (App. A, *infra*, 3a).[1] According to Valente, this projected savings would make "a considerable difference in [Bildisco's] potential profit for 1981" (C.A. App. 36a). On January 15, 1981, the bankruptcy court issued an order granting Bildisco's motion to reject the agreement (App. F, *infra*, 50a). The Union was given 30 days to file a claim for damages resulting from the rejection (*ibid.*). The district court upheld the bankruptcy court's order (App. D and E, *infra*, 44a-49a).

2. During the same period the Board was processing the unfair labor practice complaint against Bildisco. On April 23, 1981, the Board granted the General Counsel's motion for summary judgment against Bildisco. The Board concluded that, since Bildisco had not shown good cause for failing to file a timely answer,[2] the allegations in the complaint should be deemed admitted (App. C, *infra*, 30a-33a, 41a). The Board found that Bildisco, as a debtor-in-possession in reorganization proceedings, was an alter ego of the pre-bankrupt company and an "employer" within the meaning of the NLRA, and that it had violated Sections 8(a)(5) and 8(a)(1) of the Act by

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[1] The cost savings that Valente projected were based on the assumption of 10 employees in bargaining unit positions, although at the time of the hearing Bildisco was operating with only three employees in such positions (App. A, *infra*, 3a & n.2).

[2] Under the Board's rules, 29 C.F.R. 102.20, Bildisco's answer was due within 10 days of service of the complaint. Despite repeated warnings from Board staff, Bildisco failed to file an answer. Bildisco finally filed an answer on May 20, 1981, almost a month after the Board had issued its decision and order (C.A. App. 159a-161a).

unilaterally changing the terms of the collective bargaining agreement (App. C, *infra*, 33a-35a). The Board ordered Bildisco, inter alia, to cease and desist from refusing to bargain with the Union and to make the various payments and remittance of dues required by the agreement (*id.* at 38a-41a).

3. The Union's appeal from the district court's order affirming the bankruptcy court's approval of rejection and the Board's application for enforcement of its order were consolidated in the court of appeals (App. A, *infra*, 6a-7a).[3]

a. The court held first that a collective bargaining agreement is an executory contract within the meaning of Section 365(a) of the Bankruptcy Code, 11 U.S.C. (Supp. V) 365(a), and thus is subject to rejection by a debtor-in-possession (App. A, *infra*, 10a-11a). The court also concluded that a debtor-in-possession is not bound by the restrictions on midterm contract modification contained in Section 8(d) of the NLRA, 29 U.S.C. 158(d) (App. A, *infra*, 12a, 21a-22a). However, the court recognized that the usual test for rejection of executory contracts, i.e., whether rejection would benefit the estate (the "business judgment" test), should not be applied, since the "impact of rejection of a collective bargaining agreement on the rights of workers and the favored status those rights have been accorded by Congress * * * require a more stringent examination of the evidence offered to justify rejection of such a contract" (*id.* at 12a). The court accepted the conclusion of the Second Circuit in *Shopmen's Local Union No. 455* v. *Kevin Steel Products, Inc.*, 519 F.2d 698, 707 (1975) (quoting *In re Overseas National Airways, Inc.*, 238 F. Supp.

[3] The Board intervened in the Union's appeal, and the Union intervened in the Board's application for enforcement.

359, 361 (E.D.N.Y. 1965)), that, in light of the competing statutory policies, rejection of a collective bargaining agreement requires " 'thorough scrutiny, and a careful balancing of the equities on both sides' " (App. A, *infra*, 12a-13a).

However, the court declined to accept the Second Circuit's subsequent ruling in *Brotherhood of Railway Employees* v. *REA Express, Inc.*, 523 F.2d 164, 172 (2d Cir.), cert. denied, 423 U.S. 1017 (1975), that rejection of a collective bargaining agreement should be permitted only where it could be shown that the company would collapse and the employees would lose their jobs unless the agreement was rejected. The court rejected this "more stringent test" because it believed that it might be impossible to predict the success of a reorganization until very late in the proceedings and that the test unduly exalted perpetuation of the agreement over "the more pragmatic consideration of whether the employees will continue to have jobs at all" (App. A, *infra*, 14a-15a). The court instead fashioned its own standard, under which the debtor-in-possession must first demonstrate that continuation of the collective bargaining agreement would be burdensome to the estate and the bankruptcy court must then weigh the competing equities, with particular attention to doing equity between claims arising under the agreement and other claims against the debtor (*id.* at 17a). The court vacated the district court judgment and remanded the case for reconsideration in light of the test it had articulated (*id.* at 20a).

b. The court refused to enforce the Board's order. It concluded that the Board's finding that Bildisco had violated Sections 8(a)(5) and 8(a)(1) of the NLRA was premised on the view that the debtor-in-possession is an alter ego of the debtor and thus a

party to the collective bargaining agreement (App. A, *infra*, 21a). The court rejected that premise, citing the conclusion of the Second Circuit in *Kevin Steel*, *supra*, 519 F.2d at 704, that the debtor-in-possession is a " 'new entity * * * created with its own rights and duties, subject to the supervision of the bankruptcy court' " (App. A, *infra*, 21a-22a).

The court further concluded that rejection of the agreement related back to the day before the Chapter 11 petition was filed, citing 11 U.S.C. (Supp. V) 365(g)(1), and that this meant that in effect no labor contract existed between the union and the debtor-in-possession subsequent to April 14, 1980 (App. A, *infra*, 24a-25a). The court stated that the rejection did not affect obligations that had arisen prior to the date of the petition, so that the Board would not be precluded from finding an unfair labor practice and imposing monetary relief based on Bildisco's pre-petition conduct (*id.* at 25a-26a). The court remanded so that the Board could separate pre-petition conduct from post-petition conduct. The court expressly stated that if the bankruptcy court again permitted rejection of the collective bargaining agreement the Board would be bound by that determination and thus precluded from finding any unfair labor practice based on failure to meet obligations under the rejected agreement in the post-petition period (*ibid.*).

REASONS FOR GRANTING THE PETITION

This case raises significant and recurring questions concerning accommodation of the policies underlying two statutory schemes—the National Labor Relations Act and the Bankruptcy Code. The decision of the court of appeals acknowledgedly conflicts with decisions of the Second Circuit regarding the showing

that must be made by a debtor-in-possession in order to justify rejection of a collective bargaining agreement during Chapter 11 reorganization proceedings. The standard for rejection fashioned by the court of appeals in this case gives insufficient weight to the important statutory policy in favor of collective bargaining. In addition, the court of appeals' holding that the Board is precluded from finding an unfair labor practice based on a debtor-in-possession's unilateral alteration of the terms of a collective bargaining agreement during the period between filing of a Chapter 11 petition and court approval of rejection of the agreement seriously and improperly interferes with the Board's enforcement of the NLRA. The recent dramatic increase in bankruptcy filings makes resolution of these questions particularly important. Review by this Court is therefore warranted.

1. a. Rejection of a collective bargaining agreement by a debtor-in-possession during reorganization proceedings involves a confrontation between the statutory policies of the National Labor Relations Act and those of the Bankruptcy Code. See App. A, *infra*, 7a. Section 8(a)(5) of the NLRA, 29 U.S.C. 158(a)(5), makes it an unfair labor practice for an employer, including a trustee in reorganization proceedings,[4] to refuse to bargain collectively with the representatives of his employees. Section 8(d), 29 U.S.C. 158(d), defines the duty to bargain collectively to mean, inter alia, that no party to a collective bargaining agreement shall "terminate or modify it"

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[4] Section 2(1) of the NLRA, 29 U.S.C. (Supp. IV) 152(1), provides that the term "person" includes trustees in cases under Title 11; Section 2(2) of the Act, 29 U.S.C. 152(2), provides that the term "employer" includes any person acting as an agent of an employer, directly or indirectly.

unless that party follows specified procedures.[5] Under these provisions, it is a violation of the Act for a party unilaterally to modify or abrogate a collective bargaining agreement. These provisions embody a central purpose of the labor laws: "the promotion of collective bargaining as a method of defusing and channeling conflict between labor and management." *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 674 (1981).

On the other hand, Section 365(a) of the Bankruptcy Code, 11 U.S.C. (Supp. V) 365(a), provides that a debtor-in-possession may reject executory contracts upon approval by the bankruptcy court.[6] The mechanism of rejection serves an underlying purpose of the bankruptcy laws, since rejection of burdensome

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[5] The required procedures under Section 8(d) include notice to the other party to the agreement and to the Federal Mediation and Conciliation Service, an offer to negotiate a new agreement, and continuation of the agreement for a 60-day period following notice of termination or modification, or until the expiration date of the contract, whichever occurs later. These conditions for modification or termination are designed to "facilitate agreement in place of economic warfare." *Allied Chemical Workers, Local Union No. 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 187 (1971). However, Section 8(d) permits a party to a collective bargaining agreement with a fixed expiration date to refuse to discuss or agree to any modification of the agreement during its term. See *Oak Cliff-Golman Baking Co.*, 207 N.L.R.B. 1063 (1973), enforced, 90 L.R.R.M. (BNA) 2615 (5th Cir. 1974); *C&S Industries*, 158 N.L.R.B. 454, 456-458 (1966).

[6] Section 365(a) provides in pertinent part that "the trustee, subject to the court's approval, may assume or reject any executory contract * * *." Since a debtor-in-possession may exercise the powers of a trustee, 11 U.S.C. (Supp. V) 1107, it may apply for permission to reject executory contracts.

obligations may help a company to return to financial viability. Nothing in the Bankruptcy Code or its history expressly excludes collective bargaining agreements from the class of executory contracts that may be rejected. Section 313(1) of the Bankruptcy Act, 11 U.S.C. 713(1), which also provided for court approval of rejection of executory contracts in reorganization proceedings, likewise did not indicate how collective bargaining agreements were to be treated. Thus, courts have been faced with the need to find a satisfactory resolution of "the tension between the [bankruptcy statute's] policy in favor of giving the debtor a new start and the Labor Act's policy of encouraging enforcement of collective bargaining agreements * * *." *Brotherhood of Railway Employees* v. *REA Express, Inc.*, 523 F.2d 164, 167 (2d Cir.), cert. denied, 423 U.S. 1017 (1975).

b. The Second Circuit led the way in fashioning an accommodation between the NLRA, on the one hand, and Section 313(1) of the old Bankruptcy Act, 11 U.S.C. 713(1) (the predecessor of Section 365 of the Bankruptcy Code), on the other. In *Shopmen's Local Union No. 455* v. *Kevin Steel Products, Inc.*, 519 F.2d 698 (2d Cir. 1975), the court held that collective bargaining agreements constituted executory contracts within the meaning of Section 313(1).[7] It

[7] The court found no indication that Congress had meant to exclude collective bargaining agreements from the broad language of Section 313(1). 519 F.2d at 704-705. It noted that, when Congress wished to remove labor agreements from the scope of a general power to reject executory contracts, it knew how to do so, citing Section 77(n) of the Bankruptcy Act, 11 U.S.C. 205(n), which specifically prohibited a bankruptcy court or trustee from changing wages or working conditions of railroad employees except in the manner prescribed by the Railway Labor Act. 519 F.2d at 704-705.

concluded also that Section 8(d) of the NLRA did not preclude a bankruptcy court from allowing rejection of a collective bargaining agreement.[8] However, the court held that a proper accommodation of the interests served by the labor laws required that in the case of collective bargaining agreements bankruptcy courts should use a standard different from the "business judgment" test normally applied to determine whether an executory contract should be rejected. The court concluded that the decision whether to allow rejection of labor agreements should not be based solely on whether rejection would improve the financial status of the debtor, because such a "narrow approach totally ignores the policies of the Labor Act and makes no attempt to accommodate to them" (519 F.2d at 707). Rather, a bankruptcy court should permit rejection of a collective bargaining agreement "only after thorough scrutiny, and a careful balancing of the equities on both sides, for, in relieving a debtor of its obligations under a collective bargaining agreement, it may be depriving the employees of their seniority, welfare and pension rights, as well as other valuable benefits which are incapable

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[8] The court stated that the debtor-in-possession was not the same entity as the pre-bankruptcy company, but was a new entity with its own rights and duties subject to the supervision of the bankruptcy court (519 F.2d at 704). The court believed that the debtor-in-possession should not be required to assume an outstanding labor agreement, since this would place it in a worse position than a successor employer, which generally is not bound by an existing labor agreement (*ibid.*). In the court's view, "[u]ntil the debtor here assumes the old agreement or makes a new one, it is not a 'party' under section 8(d) to any labor agreement with the union and is simply not subject to the termination restrictions of the section" (*ibid.*).

of forming the basis of a provable claim for money damages" (*ibid.*, quoting *In re Overseas National Airways, Inc.*, 238 F. Supp. 359, 361-362 (E.D.N.Y. 1965)).

Approximately a month after its decision in *Kevin Steel*, the Second Circuit expanded on the test to be applied to rejection of collective bargaining agreements. In *Brotherhood of Railway Employees* v. *REA Express*, *supra*, the court extended the principles stated in *Kevin Steel* to agreements under the Railway Labor Act. In restating the *Kevin Steel* test for whether rejection of a collective bargaining agreement should be authorized, the court stated that in view of the serious effects rejection has on employees, it should be permitted "only where it clearly appears to be the lesser of two evils and that, unless the agreement is rejected, the [company] will collapse and the employees will no longer have their jobs" (523 F.2d at 172).

The *Kevin Steel/REA Express* standard articulated by the Second Circuit has been accepted and applied by a number of bankruptcy and district courts.[9]

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[9] See *In re Miles Machinery*, No. 81-00388 (Bankr. E.D. Mich. June 17, 1982), slip op. 4-5 (rejection disallowed); *In re David A. Rosow, Inc.*, 106 L.R.R.M. (BNA) 2842, 2843-2844 (Bankr. D. Conn. 1981) (same); *In re Connecticut Celery Co.*, 106 L.R.R.M. (BNA) 2847, 2851-2853 (Bankr. D. Conn. 1980) (same); *In re Studio Eight Lighting, Inc.*, 91 L.R.R.M. (BNA) 2429, 2430 (E.D.N.Y. 1976) (same). Compare *In re Brada Miller Freight System, Inc.*, 16 Bankr. 1002, (N.D. Ala. 1981), appeal docketed, No. 82-7043 (11th Cir. filed Jan. 28, 1982) (rejection allowed); *In re Allied Technology, Inc.*, 8 Bankr. 366 (Bankr. S.D. Ohio 1980) (rejection allowed when business had ceased operating and generating revenue); *In re Alan Wood Steel Co.*, 449 F. Supp. 165, 169-170 (E.D. Pa. 1978) (same); *In re Penn Fruit Co.*, 92 L.R.R.M. (BNA) 3548 (E.D. Pa. 1976) (rejection allowed where no possibility

The standard generally has served as a predictable guideline for employers involved in reorganization proceedings, their employees, and the Board.

c. The Third Circuit here expressly rejected a crucial aspect of the Second Circuit standard for rejection of collective bargaining agreements. Under the decision below a debtor-in-possession need not make a threshold showing that the company is likely to go out of business unless a collective bargaining agreement is rejected. The failure to require such a showing is erroneous.

Under the old Bankruptcy Act, the courts generally required debtors-in-possession to make the threshold showing. Congress presumably was aware of this judicial interpretation at the time it enacted the new Bankruptcy Code in 1978, see *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978), but gave no indication that it intended to overrule it. Congressional reenactment of the provision without substantial change strongly suggests an intent to adopt the consistent judicial interpretation of that provision. See, e.g., *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-698 (1979); *Lorillard* v. *Pons*, *supra*, 434 U.S. at 580; *NLRB* v. *Gullett Gin Co.*, 340 U.S. 361, 366 (1951).

The threshold showing required under the *Kevin Steel/REA Express* standard is necessary in order to afford adequate recognition to the important statu-

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existed of saving jobs of employees). Until the Third Circuit's decision in this case, no other court of appeals had specifically addressed the proper standard for rejection of a labor contract. Cf. *Local Joint Executive Board* v. *Hotel Circle, Inc.*, 613 F.2d 210, 213-214 n.2 (9th Cir. 1980) (finding it unnecessary to address the question whether the bankruptcy court "should apply a stricter standard for authorizing the rejection of collective bargaining agreements as a means of reconciling the policies of the labor and bankruptcy laws").

tory interest in collective bargaining. As this Court has recognized, there is a strong public interest in collective bargaining, and collective bargaining agreements occupy a special status. It is fundamental that "a collective bargaining agreement is not an ordinary contract." *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 550 (1964). See, generally, Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601 (1956). Rather, "it is a generalized code to govern * * * the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant." *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-579 (1960) (footnote omitted). The special status of collective bargaining agreements under our national labor policy argues in favor of a stringent standard governing rejection of such agreements.

Application of a strict standard for rejection of collective bargaining agreements is especially important because of the impact of rejection on employees. A collective bargaining agreement normally provides employees with many nonmonetary rights, such as seniority, grievance and arbitration procedures, and no strike/no lockout clauses; these rights, as well as any monetary benefits, are wiped out when the agreement is rejected. The availability of a claim for monetary damages for breach of the agreement is clearly inadequate to compensate employees for loss of these rights. See *Kevin Steel*, *supra*, 519 F.2d at 707. Even the monetary terms of the agreement, such as wages and benefits, stand on a different footing from the claims of commercial creditors whose contracts have been rejected. While such creditors generally spread risk among numerous customers, employees are wholly dependent on their employer for wages and benefits.

The predicament of employees is especially difficult during periods of financial recession, when bankruptcies are most likely to occur.

The statutory policy in favor of collective bargaining requires that rejection of a collective bargaining agreement be a last resort, not a routine matter. If debtors-in-possession were not required to show that a business will fail unless rejection of a labor contract is permitted, such rejection would become much more frequent. Debtors-in-possession are understandably eager to shed what they may regard as troublesome obligations under a labor contract. However, a proper accommodation of the policies underlying the labor laws requires that rejection of collective bargaining agreement obligations not occur unless it is essential to survival of the company.[10]

The acknowledged conflict between the Second and Third Circuits regarding the proper accommodation of the labor and bankruptcy laws creates uncertainty

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[10] The reasons offered by the court below for rejecting the *Kevin Steel/REA Express* test do not withstand scrutiny. The court observed first that it may be impossible to predict the success of a reorganization until late in the proceedings (App. A, *infra*, 14a). That criticism misses the point: until it *is* apparent that the business is likely to fail unless the collective bargaining agreement is rejected, a proper accommodation of the policies underlying the labor laws requires that the terms previously bargained for remain in effect. The court also expressed concern that the *Kevin Steel/REA Express* standard "would make it likely that numerous businesses attempting to reorganize will in fact be forced over the line into liquidation" (App. A, *infra*, 14a-15a). The court cites no examples of such an occurrence, and its concern appears to be groundless. If at any point during the reorganization proceedings a debtor-in-possession can show that it is likely to be forced into liquidation, it can then seek rejection of the collective bargaining agreement.

and thus is likely to stimulate considerable litigation in bankruptcy courts around the country. The conflict also prevents administration of a uniform standard for protection of collective bargaining interests; thus, union members whose employers file for reorganization in the Third Circuit will be afforded much less protection than members of the very same union whose employers file for reorganization in the neighboring Second Circuit. For example, application of the Second Circuit standard in the present case would have resulted in dismissal of the motion for rejection, since Bildisco's evidence was clearly insufficient to establish that the business would fail if the agreement were not rejected.[11] Absent a resolution of the conflict, employers, employees, and the Board will be unable to look to a single standard governing protection of rights under a collective bargaining agreement during reorganization proceedings. In light of the high number of such proceedings currently pending, resolution of the conflict is a matter of considerable importance.

d. In several other respects the standard adopted by the court below gives considerably less weight to collective bargaining interests than the Second Circuit standard. The court below established a test (App. A, *infra*, 17a) under which the debtor-in-possession first must show that an agreement is burdensome to the estate and the bankruptcy court then must balance the equities, with particular attention to establishing equity between the employees and the

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[11] The single witness for Bildisco testified only that creditors were concerned about the "union situation" at Bildisco, that Bildisco could save $100,000 in 1981 if it operated non-union, and that this would make a "considerable difference" in Bildisco's potential profit for 1981 (App. A, *infra*, 3a; C.A. App. 36a, 41a).

creditors. In addition, the bankruptcy court must make a reasoned determination that rejection of the agreement will assist the debtor-in-possession to achieve a satisfactory reorganization (*ibid.*). Under this standard it seems likely that the majority of collective bargaining agreements could be rejected. Presumably most debtors-in-possession could establish that a labor contract imposed some financial burden on the estate and deprived it of assets that could be used for other purposes. In addition, under the balancing of equities no special weight is to be given to collective bargaining interests; instead, interests of creditors are to be weighed equally with interests of employees. Presumably a court could always conclude that since creditors are compromising during reorganization, employees, too, should sacrifice.[12] Finally, rejection of contractual obligations to employees presumably could be said to assist in achieving a satisfactory reorgani-

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[12] The court of appeals indicated (App. A, *infra*, 16a) that one factor to be weighed in a balancing of the equities is the fact that employees could file a claim against the estate for damages resulting from rejection of a collective bargaining agreement. As suggested above, such a claim would provide no compensation for loss of the numerous nonmonetary rights to which employees are entitled under most collective bargaining agreements. For example, the agreement in this case included provisions relating to duties of employees, seniority, arbitration of disputes, leave, vacations, and many other aspects of the employer-employee relationship. See C.A. App. 2a-29a. In addition, recovery of any monetary claims is an uncertain proposition, since claims based on rejection are classified as pre-petition claims (see 11 U.S.C. (Supp. V) 365(g)(1)) and are thus part of the class of general unsecured claims. Thus, employees may have little chance of recovering compensation for their lost contractual rights. It is therefore improper to consider this factor as weighing in favor of rejection in a balancing of the equities.

zation in many cases. We submit, however, that such a standard gives insufficient weight to the special status of collective bargaining agreements under the NLRA and to the special hardships imposed on employees as a result of rejection.

The Third Circuit test also gives insufficient consideration to Congress' decision that the relationship between labor and management should be resolved through the collective bargaining process. The court below made no reference to the possibility that the bankruptcy court, before entertaining a petition to reject the existing agreement, could require the debtor-in-possession to attempt to reach a new agreement with the union that would preserve rights of employees to the maximum extent possible, while easing some of the financial pressure on the estate.[13] Instead, the court's test allows the bankruptcy court to usurp the parties' roles in the collective bargaining process and to decide for itself such questions as whether "it would be in the interests of the workers in a bargaining unit to be afforded the opportunity to continue to work under less generous financial benefits than to insist upon an absolute payment of vacation benefits, pension, health and welfare benefits, and wage increases" (App. A, *infra*, 18a n.13);

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[13] One court has suggested that there should be a threshold requirement that the debtor-in-possession attempt to renegotiate the collective bargaining agreement before a rejection application may be made to the bankruptcy court. *In re Price Chopper Supermarkets, Inc.*, 19 Bankr. 462, 466 (Bankr. S.D. Cal. 1982). And see Note, *The Labor-Bankruptcy Conflict: Rejection of a Debtor's Collective Bargaining Agreement*, 80 Mich. L. Rev. 134, 149-152 (1981), suggesting the same requirement. The record in this case suggests that the debtor-in-possession made no attempt whatsoever to renegotiate the collective bargaining agreement it sought to reject.

and whether the employees are likely to strike if the contract is rejected (*id.* at 16a).[14] Of course, these normally are matters that are best worked out by the parties themselves; given the mutual interest of employer and employees in preservation of the business, it would be most unusual for employees to insist on continuation of particular terms if the debtor-in-possession could demonstrate during negotiations that adherence to those terms would cause the business to fail. A proper accommodation of the statutory labor policy appears to require that, even if rejection might be warranted, the debtor-in-possession first must seek to bargain in an effort to reach a mutually satisfactory solution.[15]

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[14] The practice of bankruptcy judges of participating in the affairs of the debtor's estate, including negotiation of contracts, was one of the problems that the Bankruptcy Code was designed to avoid. See H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 88-91 (1977). The Third Circuit's standard for rejection defeats the congressional purpose by unnecessarily injecting bankruptcy judges into the arena of collective bargaining.

[15] Although the court of appeals remanded so that the bankruptcy court could apply the standard it had fashioned, the case is now ripe for review. The court of appeals' ruling "is fundamental to the further conduct of the case" (*United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945)), and the conflict between the circuits involves a "fundamental" issue. *Hanover Star Milling Co.* v. *Metcalf*, 240 U.S. 403, 408-409 (1916). The basic issue on which the Second and Third Circuits are divided—whether a debtor-in-possession must make a threshold showing that the business will fail if rejection of a collective bargaining agreement is not allowed—may be dispositive of the outcome of this case, since, if the Second Circuit test is applied, Bildisco's showing was clearly insufficient to justify rejection of the agreement, and its mo-

2. The court below also held (App. A, *infra*, 20a-26a) that if the bankruptcy court on remand authorized rejection the Board would be precluded from finding an unfair labor practice on the basis of Bildisco's conduct in the period following the filing of the Chapter 11 petition. This ruling is incorrect and seriously undermines the Board's ability to protect the collective bargaining rights of employees during reorganization proceedings, thus depriving employees of important protection at a time when they are particularly vulnerable.

The court of appeals rested its holding primarily on its conclusion that the bankruptcy court had permitted rejection of the collective bargaining agreement retroactive to the date immediately preceding the date Bildisco filed its Chapter 11 petition (see App. A, *infra*, 24a-25a). In fact, neither the bankruptcy court's order nor the district court's order (see Apps. E and F, *infra*, 49a-50a) indicates that the rejection was to be retroactive or refers to an effective date for the rejection.[16] The court of appeals (App. A, *infra*, 4a, 24a) cited 11 U.S.C. (Supp. V)

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tion should have been dismissed. Moreover, prompt resolution of this issue could avoid uncertainty and unnecessary litigation in other cases, as well as a drain on the assets of Bildisco. If the Third Circuit's test were applied, the parties would be required to present evidence on a variety of matters which, under the Second Circuit standard, either would be irrelevant or would not be reached unless the threshold showing had been made. It is important not only to the parties directly affected by business failures, but also to the efficient administration of the labor and bankruptcy laws, that the standard for rejection of collective bargaining agreements be uniform and clearly defined.

[16] Bildisco's motion requesting approval of rejection (C.A. App. 1a) also did not specify any effective date.

365(g)(1), which provides that rejection of an executory contract constitutes a breach of the contract "immediately before the date of the filing of the petition." [17] However, that section refers only to the priority of claims for damages based on rejection of the contract, not to existence of the contract in the post-petition period.[18]

It is well established that contractual obligations of a debtor continue to exist in the period following the filing of a reorganization petition. See, e.g., *Truck Drivers Local Union No. 807* v. *Bohack Corp.*, 541 F.2d 312, 321 n.15 (2d Cir. 1976): "If the contract is rejected by the bankruptcy court, it will be deemed to have been breached as of the date of filing of the petition under Ch. XI. But like any other unilateral breach of contract, it does not destroy the contract * * *." [19] A debtor-in-

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[17] See also 11 U.S.C. (Supp. V) 502(g), which states that a claim arising from rejection of an executory contract shall be determined "the same as if such claim had arisen before the date of the filing of the petition."

[18] The legislative history confirms that Congress included Section 365(g)(1) to ensure that claims based on rejection of executory contracts would be treated as pre-petition claims, i.e., that they would have the status of general unsecured claims. See H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 349 (1977); S. Rep. No. 95-989, 95th Cong., 2d Sess. 60 (1978). A similar rule applied to claims based on rejection of executory contracts under the old Bankruptcy Act. See 14 *Collier on Bankruptcy* ¶ 11-53.04[4], at 11-53-16 (J. Moore & L. King 14th ed. 1976).

[19] See also *In re W.T. Grant Co.*, 620 F.2d 319, 321 (2d Cir.), cert. denied, 446 U.S. 983 (1980); *In re Unishops, Inc.*, 553 F.2d 305, 308 (2d Cir. 1977); *In re Alfar Dairy, Inc.*, 458 F.2d 1258, 1261 (5th Cir.), cert. denied, 409 U.S. 1048 (1972); 2 *Collier on Bankruptcy* ¶ 365.03, at 365-22 (L. King 15th ed. 1982).

possession is not free to ignore its obligations under a collective bargaining agreement simply because it has filed a Chapter 11 petition; nor will court approval of rejection at some later point relieve the estate of liability for an earlier breach of the agreement.[20] Likewise, there is no reason why the Board may not find unilateral alteration of the terms of the agreement during the post-petition period to constitute an unfair labor practice. The Board's order in such a case is one "designed to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice." See *Nathanson* v. *NLRB*, 344 U.S. 25, 27 (1952). The refusal of the court of appeals to enforce the Board's order in this case frustrates that statutory policy.

The court of appeals also suggested that no unfair labor practice could have been found because the debtor-in-possession was a new entity and thus was not a party to the agreement, citing the Second Circuit's opinion in *Kevin Steel* (see App. A, *infra*, 21a-22a). However, the Second Circuit itself has warned that the "new entity" concept advanced in *Kevin Steel* cannot be carried too far. In *Truck Drivers Local Union No. 807* v. *Bohack Corp.*, *supra*, 541 F.2d at 320, the court cautioned that "the statement that the debtor is not a 'party,' and the analogy to the successor employer, cannot be taken literally, since neither affirmance nor rejection of the collective bargaining agreement would be possible by one not a

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[20] The court of appeals apparently recognized that the employees could assert claims based on Bildisco's failure to meet its contractual obligations in the post-petition period. See App. A, *infra*, 16a.

party to it." [21] The court in *Bohack Corp.* stressed that the bankruptcy laws did not authorize a debtor-in-possession to ignore its obligations under the NLRA (*ibid.*). See also *Kevin Steel, supra*, 519 F.2d at 706; App. A, *infra*, 16a. Here Bildisco committed an unfair labor practice by unilaterally altering the terms of the collective bargaining agreement in the post-petition period. The subsequent rejection of the agreement did not wipe out that unfair labor practice, and the Board therefore should not have been precluded from issuing an order.

The court of appeals' conclusion that rejection operates to wipe out the existence of a collective bargaining agreement in the period subsequent to filing of the petition places employees in a wholly untenable position. Most employees have only their own time and skills as a source of livelihood. Ordinarily they have the option of seeking alternative employment if they are unwilling to provide services under existing contractual terms. If rejection can operate to nullify those terms retroactively, employees will lose benefits for a period during which they believed themselves contractually entitled to receive them. At the same time, debtors-in-possession will be encouraged to disregard contractual obligations long before

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[21] The "new entity" concept articulated in *Kevin Steel* has not been accepted by the Board (see page 6, *supra*) and has been criticized by commentators. See, e.g., Note, *Bankruptcy and the Rejection of Collective Bargaining Agreements*, 51 Notre Dame Law. 819, 829-830 (1976); Note, *Bankruptcy Law—Labor Law—Rejection of Collective Bargaining Agreements as Executory Contracts in Bankruptcy*, 22 Wayne L. Rev. 165, 172-173 (1975) ("it is difficult to see how a debtor-in-possession can be truly distinct from its former self").

it becomes clear that they will be entitled to reject an agreement. Moreover, the expectation that rejection will be retroactive removes an important incentive for the debtor-in-possession to negotiate with the union to obtain a modification of the agreement that will preserve some employee rights before taking the drastic step of repudiating it. Finally, the court of appeals' holding seriously impairs the Board's unique ability to protect the collective bargaining interests of employees during reorganization proceedings by issuing orders directed at unfair labor practices. Such orders can operate to deter unilateral alterations in the terms of a collective bargaining agreement and also to aid employees in recovering compensation for benefits due under the agreement.[22] In a period of increasing bankruptcies, it is particularly important that the Board not be precluded from exercising its statutory responsibilities. In view of the serious practical consequences of the court of appeals' decision, review by the Court is warranted.

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[22] A Board claim for payment of wages and other benefits owing for the period of Chapter 11 operations is a claim for costs of administration and thus would receive priority in payment from the estate. See *In re Bel Air Chateau Hospital, Inc.*, 106 L.R.R.M. (BNA) 2834 (C.D. Cal. 1980). In contrast, claims based on rejection of an executory contract are treated as pre-petition claims under 11 U.S.C. (Supp. V) 365(g)(1) and thus join the class of general unsecured claims. Filing of a Board claim on behalf of a group of employees is an efficient way to obtain recovery of payments that otherwise may be too small to warrant filings on an individual basis.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1982

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-2140 and 81-2238

IN RE: BILDISCO, A General Partnership of the State of New Jersey,

LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, APPELLANT, No. 81-2140
NATIONAL LABOR RELATIONS BOARD, INTERVENOR

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil No. 81-0513)

NATIONAL LABOR RELATIONS BOARD, PETITIONER, No. 81-2238

v.

BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION, RESPONDENT

LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, INTERVENOR

National Labor Relations Board
Application for Enforcement

Argued March 19, 1982

Before: ALDISERT, VAN DUSEN, and GARTH
Circuit Judges

(Filed June 17, 1982)

OPINION OF THE COURT

ALDISERT, *Circuit Judge.*

In these consolidated proceedings we are required to accommodate the tension between two important aspects of our national policy, represented by the National Labor Relations Act and the Bankruptcy Reform Act of 1978. Specifically, we must decide whether the bankruptcy court erred in permitting a debtor-in-possession to reject a collective bargaining agreement as an executory contract. We also must consider the National Labor Relations Board's application for enforcement of its order determining that the same debtor-in-possession committed an unfair labor practice by unilaterally changing the terms of the agreement. We vacate the judgment in the appeal at No. 81-2140 and remand for further proceedings. Because the NLRB both erred in its choice and application of legal precepts and abused its discretion, however, we deny the application for enforcement at No. 81-2238.

I.

Bildisco, a New Jersey partnership engaged in selling and distributing building supplies, filed a voluntary petition for reorganization on April 14, 1980, under Chapter 11 of the Bankruptcy Code. The bankruptcy court thereafter designated the partnership as a debtor-in-possession and authorized it to operate the business under 11 U.S.C. § 1107.[1]

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[1] A debtor-in-possession is the debtor, 11 U.S.C. § 1101(1), who is given many additional rights, powers, and duties to the estate, as set forth generally in § 1107:

> (a) Subject to any limitations on a trustee under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights,

Bildisco and Local 408 of the Teamsters Union were parties to a collective bargaining agreement that on the date of the petition covered eighteen of Bildisco's employees. On January 5, 1981, the debtor-in-possession sought bankruptcy court permission to reject the collective bargaining agreement under 11 U.S.C. § 365(a), which permits rejection of executory contracts upon bankruptcy court approval. The sole witness at the hearing on the motion was one of Bildisco's partners, Sal Valente, who testified that Bildisco's creditors were concerned about the "union situation" and that by operating without the collective bargaining agreement Bildisco would be able to save approximately $100,000 in 1981. Although eighteen of Bildisco's employees were covered by the collective bargaining agreement as of the date of the petition, by the date of the hearing the number had been reduced to three.[2] The union cross-examined Valente, but it did not offer any other evidence concerning the effect of rejection on Bildisco's employees.

The bankruptcy judge, without expressly articulating the standard that he applied,[3] granted permis-

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other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106 (a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

[2] Valente estimated that Bildisco would be increasing the number of employees to ten as the off-season ended, and his projections of the savings that would be realized if the agreement were rejected are predicated on the costs of salaries and benefits to ten employees.

[3] The bankruptcy judge concluded his consideration of the standard to be applied as follows:

sion to reject on January 15, 1981, retroactive to the date immediately preceding the date of the petition. *See* 11 U.S.C. § 365(g)(1). The union appealed to the district court, which on May 4, 1981, issued a bench opinion affirming the order of the bankruptcy court. Noting that the bankruptcy judge had not identified the test he had used, the district court held that the permission to reject was proper in any event.

In the meantime, the union had filed unfair labor practices charges with the NLRB complaining that Bildisco had refused to grant certain wage increases, to pay pension and welfare contributions, or to turn over union dues, all in violation of the collective bargaining agreement. After investigating the charges,

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I don't know under the Code what power the court has to disapprove an application to reject a contract, unless it can be shown it was a promiscuous act on the part of the debtor, and it was really a beneficial contract.

It is surely not a beneficial contract if it costs him $132 a week, which is my own computation, more than he would have to pay if he didn't have the contract.

Under the circumstances I am going to have to allow the motion of the debtor.

App. at 62-63. Subsequently, the following dialogue took place:

COUNSEL FOR THE UNION: Just for the record, your Honor, with respect to the ruling today, it is your position, your Honor—and correct me if I am wrong—the cases prior to the enactment of the Bankruptcy Code, those cases dealing with special considerations given collective bargaining are no longer applicable?

. . . .

THE COURT: All I am saying is this is not a case under the Bankruptcy Act; it is under the Bankruptcy Code.

Under Section 365 I have to grant the motion to reject.

App. at 64-65.

the General Counsel of the NLRB issued a complaint on July 31, 1980, alleging that Bildisco, and Bildisco as debtor-in-possession, had engaged in unfair labor practices in violation of sections 8(a)(1) and (5) of the National Labor Relations Act by making unilateral changes in the collective bargaining agreement. The complaint advised Bildisco that a hearing had been scheduled for March 9, 1981, more than seven months later, and that if Bildisco did not answer the complaint within ten days of service, all of the allegations would be deemed admitted. On September 24, 1980, a Board agent advised Valente of the company's obligation to answer the complaint. On October 8, the General Counsel issued an amended complaint reflecting additional union allegations that the company had failed to pay vacation benefits to its employees. On October 27, 1980, a Board attorney informed Valente by telephone and by letter that he would seek summary judgment if no answer to the amended complaint were received by October 31. No answer was filed.

On January 27, 1981, twelve days after the bankruptcy court authorized rejection of the collective bargaining agreement, the Board's General Counsel moved for summary judgment based on Bildisco's failure to answer the amended complaint. Two days later Bildisco responded with a request for a 60-day stay of proceedings so that it could apply for bankruptcy court permission to retain special labor counsel. The General Counsel opposed this request.

On February 9, 1981, the Board issued a notice to show cause why summary judgment should not be granted. Bildisco responded on February 20 that its delay in filing an answer was caused by the disruption of Chapter 11 proceedings and that it had not yet received bankruptcy court permission to retain

special labor counsel.[4] It also informed the Board that the bankruptcy court had granted its motion for permission to reject the collective bargaining agreement. Noting the retroactive effect of the rejection, the debtor-in-possession argued that no contract existed between it and the union after April 14, 1980. It argued also that any unpaid contributions due prior to the petition did not constitute unilateral changes in the contract, but were claims subject to allowance in Bildisco's Chapter 11 proceeding.

On April 23, 1981, stating that Bildisco had not shown good cause for failing to file a timely answer, the Board granted the General Counsel's motion for summary judgment, notwithstanding its notification two months earlier that the bankruptcy court had permitted Bildisco to reject the agreement. The order, addressed to "Bildisco and Bildisco, debtor-in-possession," required Bildisco to make all the delinquent contributions and payments plus interest, to honor the terms of the collective bargaining agreement, and to post appropriate notices. The NLRB made a "finding of fact" that the debtor-in-possession "is, and has been at all times material herein since April 17, 1980, an alter ego in bankruptcy to Bildisco." App. at 131.[5] The Board subsequently applied to this court for enforcement of its order.

We granted the Board's motion to consolidate the two cases. The Board has intervened in the union's appeal from the district court order, and the union

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[4] The bankruptcy court granted Bildisco this permission on April 16, 1981.

[5] The respondent filed a motion for reconsideration accompanied by an answer to the Board's complaint; the Board rejected the motion because it was postmarked two days after the deadline for such motions. *See* 29 C.F.R. § 102.48(d)(2).

has intervened in the Board's application for enforcement. We will consider the appeal and the application for enforcement in turn.

II.

The rejection of a collective bargaining agreement under the new Bankruptcy Code, which implicates a significant confrontation of labor and bankruptcy policies, is a matter of first impression in the courts of appeals. Nevertheless, we have the benefit of both statutory direction and the decisions of other courts interpreting the equivalent section of the former Bankruptcy Act and the relevant provisions of the NLRA.

A.

Underlying Chapter 11 of the Code is a legislative policy to provide opportunities for a debtor to reduce or extend debts so that it can return to financial viability.

> The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders. The premise of a business reorganization is that assets that are used for production in the industry for which they were designed are more valuable than those same assets sold for scrap. Often, the return on assets that a business can produce is inadequate to compensate those who have invested in the business. Cash flow problems may develop, and require creditors of the business, both trade creditors and long-term lenders, to wait for payment of their claims. If the business can extend or reduce its debts, it often can be

> returned to a viable state. It is more economically efficient to reorganize than to liquidate, because it preserves jobs and assets.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 220 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6179. If a business can be turned around by reorganization, its creditors will recover more on their claims than in a Chapter 7 liquidation,[6] its employees will keep their jobs, and the public will continue to benefit from its production. Thus the debtor, its creditors and employees, and the public at large benefit from the business' survival. Under the congressional schema, this goal is promoted by numerous specific mechanisms, including continued operation in the hands of the debtor-in-possession or trustee, under supervision of the court, with a "breathing spell" free from the collections efforts of creditors. Another mechanism is to allow the debtor-in-possession to reject executory contracts that would burden the estate. *See* 2 Collier on Bankruptcy ¶¶ 365.01-03 (15th ed. 1981). *See generally Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 318 U.S. 523, 549-51 (1943); *Sparhawk* v. *Yerkes*,

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[6] Experience under the Bankruptcy Act demonstrated that creditors received larger portions of their claims from reorganization proceedings than from liquidations. According to tabulations taken from a sample of bankruptcy cases, priority creditors usually received full payment in a successful reorganization but realized less than one-third of the amount of their claims in a straight bankruptcy. Unsecured creditors realized only a median nineteen percent under one-payment plans and ten percent under deferred payment plans when the debtor went through reorganization, but in straight bankruptcies the median was only eight percent. D. Stanley & M. Girth, Bankruptcy: Problem, Process, Reform 129-30, 142-43 (1971).

142 U.S. 1, 13 (1891); *In re Italian Cook Oil Corp.*, 190 F.2d 994 (3d Cir. 1951).

Section 365(a) of the Code provides, with exceptions not now relevant, that "the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." [7] Under Chapter 11 a debtor-in-possession has essentially the same powers as a trustee,[8] and it therefore may reject executory contracts with the authorization of the bankruptcy court.

B.

This case places the statutory policies underlying Chapter 11 in tension with our national labor policy, as expressed in the National Labor Relations Act. Broadly stated, that policy is to promote industrial peace by facilitating collective bargaining. Sections 7 and 8 of the NLRA, 29 U.S.C. §§ 157 and 158, guarantee the rights of workers to organize and to bargain collectively and protect both employees and employers from unfair labor practices that undermine these rights.

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[7] The analogous provision of the Bankruptcy Act stated:

> Upon the filing of a petition, the court may, in addition to the jurisdiction, powers, and duties conferred and imposed upon it by this chapter—
>
> (1) permit the rejection of executory contracts of the debtor, upon notice to the parties to such contracts and to such other parties in interests as the court may designate. . . .

Bankruptcy Act of 1898, § 313, 11 U.S.C. § 713 (1976) (repealed).

[8] 11 U.S.C. § 1107. Under certain circumstances the court may appoint a trustee to operate the business. 11 U.S.C. §§ 1104, 1108.

The specific statute relied on by the union and the Labor Board is § 8(d) of the NLRA, which provides that no party to a collective bargaining agreement may "terminate or modify" the agreement without following a specified procedure.[9] Our task is to reconcile the apparent conflict between the NLRA and the Bankruptcy Code and the policies they represent.

III.

In enacting § 365, Congress provided no indication that collective bargaining agreements were to be immune from rejection and thus unique among executory contracts. Indeed, the few inferences of congressional intent that may be gleaned from the Code and

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[9] Termination or modification of a collective bargaining agreement is permitted by § 8(d) only if the moving party

> (1) serves a written notice upon the other party to the contract . . .;
>
> (2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;
>
> (3) notifies the Federal Mediation and Conciliation Service . . . and . . . any State or Territorial agency established to mediate and conciliate disputes within the State or Territory . . .;
>
> (4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later: . . . [T]he duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

29 U.S.C. § 158(d).

its legislative history are to the contrary. First, notwithstanding several judicial decisions holding collective bargaining agreements susceptible to rejection,[10] Congress afforded collective bargaining agreements no special treatment. Significantly, Congress did provide detailed provisions for acceptance of executory contracts such as shopping center leases, § 365(b)(3), and regarding transactions in commodities futures contracts, §§ 765, 766. Moreover, one particular species of collective bargaining agreement was singled out:

> Notwithstanding section 365 of this title, neither the court nor the trustee may change the wages or working conditions of employees of the debtor established by a collective bargaining agreement that is subject to the Railway Labor Act (45 U.S.C. 151 et seq.) except in accordance with section 6 of such Act (45 U.S.C. 156).

11 U.S.C. § 1167. The sheer complexity of the Bankruptcy Reform Act might preclude our use of § 1167 as definitive proof that every other collective bargaining agreement may be rejected, but the section permits an inference that, with this one exception, Congress did not intend to distinguish collective bargaining agreements from executory contracts in general.

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[10] *See, e.g., Truck Drivers Local Union No. 807* v. *Bohack Corp.*, 541 F.2d 312 (2d Cir. 1976); *Brotherhood of Railway, Airline and Steamship Clerks* v. *REA Express, Inc.*, 523 F.2d 164 (2d Cir.), *cert. denied*, 423 U.S. 1017, 1073 (1975); *Shopmen's Local Union No. 455* v. *Kevin Steel Products, Inc.*, 519 F.2d 698 (2d Cir. 1975); *Local Joint Executive Board, AFL-CIO* v. *Hotel Circle, Inc.*, 419 F.Supp. 778 (S.D. Cal. 1976), *aff'd*, 613 F.2d 210 (9th Cir. 1980).

IV.

Having determined that § 365(a) authorizes the bankruptcy court to permit the rejection of collective bargaining agreements, we now turn to the standards it should use in considering such a request. We begin by rejecting the concept that the proceeding under § 8(d) of the NLRA is mandated. As more fully developed in Part VI-A, *infra*, a debtor-in-possession is a new entity, separate and apart from the pre-bankruptcy company, and does not become a party to an executory contract unless it assumes the contract. Bildisco, as a debtor-in-possession, was not a party to the collective bargaining agreement, and therefore not bound by § 8(d). *Shopmen's Local Union No. 455* v. *Kevin Steel Products, Inc.*, 519 F.2d 698, 704 (2d Cir. 1975). The burden of persuading the bankruptcy court to permit rejection of a collective bargaining agreement must be placed on the moving party: the debtor-in-possession or the trustee. Our critical task is to establish the extent of that burden.

A.

The usual test for rejection of an executory contract is simply whether rejection would benefit the estate, the "business judgment" test. *See* 2 Collier on Bankruptcy ¶ 365.03 (15th ed. 1981). The impact of rejection of a collective bargaining agreement on the rights of workers and the favored status those rights have been accorded by Congress, however, require a more stringent examination of the evidence offered to justify rejection of such a contract. The second circuit in *Kevin Steel*, speaking through Judge Feinberg, accommodated the interests of the workers by holding that rejection of a collective bargaining agreement requires " 'thorough scrutiny, and a care-

ful balancing of the equities on both sides.'" 519 F.2d at 707 (quoting *In re Overseas National Airways, Inc.*, 238 F.Supp. 359, 361 (E.D.NY. 1965)).

We accept this formulation of the appropriate relationship between the competing statutory policies. It accommodates the statutory policies of the Labor Act by demanding a greater evidentiary showing than for rejection of a typical executory contract, but it does not erect impossible barriers to rejection of labor contracts in violation of the policies underlying Chapter 11. It plots a middle course between the possible extremes, requiring a sensitive weighing of the competing private and public interests in the context of the particular case.

We reject, however, the formulations of subsequent decisions pressed on us by the union and the Board, which purport to follow the rule of *Kevin Steel* but instead replace its "balancing of the equities" with a test predicating permission to reject on a showing "that an onerous and burdensome executory collective bargaining agreement will thwart efforts to save a failing carrier in bankruptcy from collapse." *Brotherhood of Railway, Airline and Steamship Clerks* v. *REA Express, Inc.*, 523 F.2d 164, 169 (2d Cir.), *cert. denied*, 423 U.S. 1017, 1073 (1975).[11] Accord-

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[11] They reflect a phenomenon that our distinguished, former colleague, the late William H. Hastie, called "trampling upon graves": adding a substantial gloss to a previously stated holding but improperly citing the former case as the authority for the new formulation. Of course, the development of the law often consists of adding gloss to previous cases, as Cardozo described it: "Given a mass of particulars, a congeries of judgments on related topics, the principle that unifies and rationalizes them has a tendency, and a legitimate one, to project and extend itself to new cases within the limits of its

ing to *REA Express*, rejection should be permitted "only where it clearly appears to be the lesser of two evils and that, unless the agreement is rejected, the carrier will collapse and the employees will no longer have their jobs." *Id.* at 172. The district court in this case and the court in *In re Alan Wood Steel Co.*, 449 F.Supp. 165 (E.D.Pa. 1978), *appeal dismissed*, 595 F.2d 1211, 1214 (3d Cir. 1979), apparently building on *REA Express* and *In re Penn Fruit Co.*, 92 L.R.R.M. (BNA) 3548 (E.D. Pa. 1976), declared that *Kevin Steel* required a two step analysis:

> First, the court should determine that the agreement is onerous and burdensome to the estate, *so that failure to reject will make a successful arrangement impossible.* Second, the equities must be balanced and found to favor the debtor. Then, and only then, may rejection of a collective bargaining agreement be permitted.

449 F. Supp. at 169, *quoted in* district court op. at 4-5 (emphasis added).

The italicized portion of the first step, in our view, goes well beyond the "balancing of equities" required by *Kevin Steel*. We reject this more stringent test for two discrete but related reasons: first, for the pragmatic reason that it may be impossible to predict the success *vel non* of a reorganization until very late in the arrangement proceedings; and second, for the prudential consideration that the imposition of such a test unduly exalts the perpetuation of the collective bargaining agreement over the more pragmatic con-

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capacity to unify and rationalize." B. Cardozo, The Nature of the Judicial Process 31 (1921). But it is quite another thing to disguise an expansion of the law by pretending that the court is simply applying a previously stated rule of law.

sideration of whether the employees will continue to have jobs at all.

At the date of oral argument in these proceedings, March 19, 1982, Bildisco was still operated by a debtor-in-possession under the supervision of the bankruptcy court. Thus almost two years after the petition for reorganization was filed and over a year after the court granted the debtor-in-possession permission to reject the agreement, there is still no assurance that Bildisco will successfully reorganize. We simply do not and cannot know whether it will be forced into liquidation. It is entirely unrealistic to require the bankruptcy court at an early stage of a reorganization proceeding to predict whether reorganization will be impossible absent rejection of the labor contract. In the common law tradition the acceptability or durability of a legal rule is directly dependent upon its utility. The rule urged upon us by the NLRB and the union appears to us deficient because we know of no formula readily available to a bankruptcy court in an early stage of a Chapter 11 reorganization that could reasonably predict whether a business reorganization will succeed.

We also reject the more stringent test because it could work to the detriment of the workers it seeks to protect. By erecting an excessive evidentiary barrier to rejection of labor contracts, the *REA Express-Alan Wood Steel* formulation would make it likely that numerous businesses attempting to reorganize will in fact be forced over the line into liquidation. Adherence to a collective bargaining agreement together with a successful reorganization is surely the best of possible worlds; but given the inevitable potential for conflict between these goals we think it preferable that jobs be preserved through rejection of

a labor contract than that they be lost because of its acceptance.

In the multiplicity of fact situations that will arise, we think our best option is to require the bankruptcy courts to undertake a "thorough scrutiny, and a careful balancing of the equities on both sides" as set forth in *Kevin Steel*. Each case will present its own complexities. For example, the bankruptcy court must understand that the debtor-in-possession who rejects a collective bargaining agreement remains an employer and is still required by the NLRA to bargain with the representatives of its employees, *Kevin Steel*, 519 F.2d at 704, and that its employees retain their right to strike should negotiations fail, *see In re Ryan Co.*, 83 Lab.Cas. (CCH) ¶ 10,487 at 17,952 n.2 (D.Conn. 1978). The consequences of a strike on a precarious business therefore must be one factor to be weighed by the bankruptcy court. Moreover, because under § 365(g) rejection constitutes a breach of contract, the employees may assert a claim for the value of the benefits lost. The court should consider both the impact of the resulting claim against the debtor and the adequacy of the relief employees might obtain through the claims procedures.[12]

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[12] Among other factors bankruptcy courts might consider in balancing the equities are, for example, the proportion of the debtor's employees covered by the collective bargaining agreement, how those employees' wages and benefits compare to those of others in the industry, and the good or bad faith of the parties in dealing with the effect of the company's insolvency on its labor obligations. *See* Note, *The Bankruptcy Law's Effect on Collective Bargaining Agreements*, 81 Colum. L. Rev. 391, 401-03 (1981). The listing of these considerations is not intended to be all-inclusive.

B.

We are satisfied that *Kevin Steel*, isolated from its illegitimate progeny, provides the appropriate framework for an intelligent and equitable approach to the problem because it gives collective bargaining agreements a measure of protection beyond that available under the business judgment test without unduly advancing the interests served by the Labor Act over the other interests of the employees and those of the debtor's other creditors. We believe that the debtor-in-possession must first demonstrate that the continuation of the collective bargaining agreement would be burdensome to the estate; that once this threshold determination has been made the debtor-in-possession must make a factual presentation sufficient to permit the bankruptcy court to weigh the competing equities; that the polestar is to do equity between claims which arise under the labor contract and other claims against the debtor; that, in this, the court must consider the rights of covered employees as supported by the national labor policy as well as the possible "sacrifices which other creditors are making" in the effort to bring about a successful reorganization, *Group of Institutional Investors*, 318 U.S. at 550; and that the court must make a reasoned determination that rejection of the labor contract will assist the debtor-in-possession or the trustee to achieve a satisfactory reorganization. We believe that particularly in a time of economic uncertainty and distress an analysis following this pattern provides more protection to both employer and employee than the test urged upon us by the union and the NLRB.[13]

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[13] According to data supplied by the U.S. Department of Labor, as of February, 1982, 9.6 million Americans wanting to work were unable to find jobs. This constitutes 8.8% of

V.

Having identified the considerations properly applicable to rejections of collective bargaining agreements, we turn to the appeal at No. 81-2140; and we begin by examining the arguments presented to the bankruptcy court. The union argued that the proper test was that articulated in *REA Express* and *Alan Wood Steel:* rejection is permissible only if reorganization otherwise would be impossible and if the equities favor the debtor. Counsel for the debtor-in-possession, on the other hand, submitted that collective bargaining agreements are to be treated like all other executory contracts and that rejection should be permitted whenever it would benefit the debtor.

The bankruptcy court's bench opinion unfortunately was a woefully inadequate treatment of a sophisticated subject. It is not clear whether the bankruptcy court chose one of the two standards

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the work force and an increase from 3.4% in January-March 1969, 4.6% in October 1973, and 5.7% in May-July 1979. Because Bildisco is involved in the building supply business, a business directly associated with the construction business, and the employees who are covered by the labor contract are warehousemen, drivers, mechanics, and outside field servicemen, it is significant that 18.1% of the nation's construction workers were unemployed compared with 12.5% of blue-collar workers in general. U.S. News & World Report, March 15, 1982, at 71-73. Under circumstances of a distressed economy, a bankruptcy court could properly consider that it would be in the interests of the workers in a bargaining unit to be afforded the opportunity to continue to work under less generous financial benefits than to insist upon an absolute payment of vacation benefits, pension, health and welfare benefits, and wage increases. In weighing the equities the court could well conclude that it is in the public interest for employees to work without the advantage of fringe benefits than not to work at all.

proffered by the parties or applied a synthesis of the two.[14] Where the state of the law is settled there are three critical prerequisites to a determination of reversible error: (a) specific acts or omissions by the trial court constituting legal error, (b) properly suggested as error to the trial court, and (c), if uncorrected on that level, then properly presented for review to the appellate court. Assuming that the trial court erred, for there to be reversible error, we must be able to determine that appellant properly identified the error and requested the trial court to take a legally appropriate course of action. *Pfeifer* v. *Jones & Laughlin Steel*, —— F.2d ——, —— n.1, No. 81-1928 (3d Cir. April 16, 1982), slip op. at 6 n.1. In the district courts, Fed.R.Civ.P. 46 requires a party to "[make] known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor." This requirement affords an opportunity for error correction and avoidance in the trial court in various ways: It gives the adversary the opportunity either to avoid the challenged action or to present a reasoned defense of the trial court's action, and it provides the trial court with the alternatives of modifying its decision or of ordering a more fully developed record for review. It also challenges the court to articulate the grounds for its decision and thus facilitates appellate review.

Where the state of the law is not settled, and the court of the first instance has not set forth a reasoned

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[14] The district court affirmed the bankruptcy court by determining that, applying either test, the contract was appropriately rejected. The district court's analysis need not detain us, however, because our role as a court of review is identical to that of the district court. *Universal Minerals, Inc.* v. *C.A. Hughes & Co.*, 669 F.2d 98, 101-02 (3d Cir. 1981).

elaboration for its decision, as here, an appellate court cannot determine what motivated the trial court's decision. It cannot properly determine whether there was a specific act or omission constituting legal error. Even though an appellate court can affirm on the basis of reasons different from those set forth by the trial court, *Rhoads* v. *Ford Motor Co.*, 514 F.2d 931 (3d Cir. 1975), a reviewing court cannot properly perform its function until the parties are given the opportunity to prepare a record and the trial court the opportunity to apply in the first instance newly formulated precepts to the facts adduced. Because we have set forth in detail the appropriate precepts to apply in a hitherto unsettled area of the law, and because we do not have the benefit of an adequate explanation of the trial court's action, the preferable course is to remand the proceedings for reconsideration in light of the precepts we announce today. Accordingly, we vacate the judgment of the district court and remand to it with a direction that the cause be further remanded to the bankruptcy judge for reconsideration.

VI.

We now turn to the Board's application at No. 81-2238 for the enforcement of its summary judgment determining that the debtor-in-possession had committed an unfair labor practice.

It must be emphasized that we are not faced with an application for enforcement of an NLRB order entered after reception of evidence by an administrative law judge and a review of the record by the Board. We have only an application for enforcement of summary judgment; our denial of enforcement does not preclude the Board from processing the

charges through a full hearing, guided and governed by the bankruptcy court's determination on remand concerning the rejection of the collective bargaining agreement, and by the views which we have expressed in this opinion.

A.

The basis of the unfair labor practice charges is an allegation that the debtor-in-possession unilaterally changed the terms of the collective bargaining agreement and thereby failed to bargain in good faith, in violation of sections 8(a)(1) and (5) of the NLRA. The Board's theory depends upon its contention that the debtor-in-possession is an alter ego of the debtor and thereby a party to the collective bargaining agreement. The Board's argument fails, however, because, as a matter of law, a debtor-in-possession is "[a] new entity . . . created with its own rights and duties, subject to the supervision of the bankruptcy court." *Kevin Steel*, 519 F.2d at 704 (footnote omitted). A debtor-in-possession is given powers comparable to those of a trustee, and it is thus an officer of the court. 11 U.S.C. § 1107. As the House and Senate Reports explaining § 1107 emphasize:

> This section places a debtor in possession in the shoes of a trustee in every way. The debtor is given the rights and powers of a chapter 11 trustee. He is required to perform the functions and duties of a chapter 11 trustee (except the investigative duties). He is also subject to any limitations on a chapter 11 trustee, and to such other limitations and conditions as the court prescribes.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 404 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963,

6360; S. Rep. No. 989, 95th Cong., 1st Sess. 116 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5902. The debtor-in-possession's position is analogous to that of a successor employer: it may be required to recognize and bargain with the union, but it is not a party to its predecessor's collective bargaining agreement unless it assumes that agreement. *NLRB* v. *Burns Security Services, Inc.*, 406 U.S. 272, 284 (1972); *Kevin Steel*, 519 F.2d at 704. Because Bildisco as debtor-in-possession is not a party to the agreement with Local 408, it had the ability to reject the agreement without following the procedures outlined in § 8(d). We suggest to the NLRB that, at least in matters within this judicial circuit, it cease operating under such a fundamental misconception of the law. Indeed, we believe that persisting in such a misconception—one that goes to the difference between the pre-bankruptcy company which was the signatory to the collective bargaining agreement and the succeeding debtor-in-possession—is so fundamental that this error in and of itself is sufficient reason to refuse to enforce a summary judgment so predicated.

B.

The Board contends, however, that this court may not consider Bildisco's defenses to the unfair labor practice complaint because they were not urged before the Board in a timely manner. Section 10(e) of the NLRA, 29 U.S.C. § 160(e), provides that "[n]o objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances"; and the Supreme Court has consistently held that, in the absence of extraor-

dinary circumstances, "the failure or neglect of a respondent to urge an objection in the Board's proceedings forecloses judicial consideration of the objection in enforcement proceedings." *NLRB* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318, 322 (1961). The Board contends that the debtor-in-possession's sole excuse for its failure to file an answer was the disruption in its operations caused by reorganization proceedings, and that this excuse would not come within § 10(e)'s "extraordinary circumstances" exception.

We hold that § 10(e) is inapplicable to this case because the objection was urged before the Board at a time when the Board could have taken meaningful notice of it. Inasmuch as the date of the hearing had not yet passed, the Board's draconian remedy was unwarranted. We have recently observed that

> an administrative agency like the NLRB, burdened with an extremely heavy caseload, must necessarily rely upon compliance with procedural rules to function efficiently. As part of the process, reasonable time limitations must be set and observed. Nevertheless, there are instances where wooden and unreasoning insistence upon technical procedural rules results, not in the proper disposition of a cause, but in injustice. Failure to take remedial measures when such incidents occur constitutes an abuse of discretion.

Livingston Powdered Metal, Inc. v. *NLRB*, 669 F.2d 133, 137 (3d Cir. 1982). We recognize that the response to the complaint here was exceedingly tardy, more so than in *Livingston* or its companion case of *Kessler Institute for Rehabilitation* v. *NLRB*, 669 F.2d 138 (3d Cir. 1982). But in *National Book Consolidators, Inc.* v. *NLRB*, 672 F.2d 323 (3d Cir.

1982), we required the Board to "utilize a 'good cause' standard in determining whether to accept filing of an answer," explaining that " '[t]he purpose of the "good cause" standard . . . is to ensure that the Board makes decisions on the merits despite technical and inadvertent noncompliance with procedural rules.' " *Id.* at 326 (quoting *NLRB* v. *Zeno Table Co.*, 610 F.2d 567, 569 (9th Cir. 1979)).

We do not suggest that the mere fact that a debtor-in-possession is implicated in the proceedings is itself sufficient reason for a delay. But the drastic circumstances here, where a work force of eighteen union members had been reduced to three in a business intimately associated with the construction industry, one of the most distressed industries of the present recession, and where the pre-bankruptcy company had been in active reorganization by a debtor-in-possession for over a year, we believe that the Board was presented with a "good cause" for accepting an untimely response and proceeding to consider what appears to us to be a most persuasive argument on the merits.

The timetable is significant. The amended complaint was filed October 8, 1980, and set a March 9, 1981, hearing date. On February 20, 1981, responding to the Board's order to show cause, Bildisco notified the Board that the bankruptcy court had entered an order on January 15, 1981, granting its motion to reject the labor contract. We do not condone the failure of the debtor-in-possession to respond to the complaint, but we will not enforce a Board order that cavalierly refuses to recognize an outstanding federal court order directly relating to the proceedings before it. Because rejection related back to the day before the Chapter 11 petition was filed, 11 U.S.C. § 365(g)(1), no labor contract effectively existed be-

tween the union and the debtor-in-possession, subsequent to April 14, 1980. In its thirteen page decision and order dated April 23, 1981, however, the Board failed even to acknowledge, much less to consider the effect of, the bankruptcy court order permitting rejection.

The Board did not explain how, as an agency of the executive branch, it can ignore the order of a federal court. We perceive no excuse for this disregard. It is as much a departure from acceptable decision-making for the NLRB to decide a case within its competence without accommodating competing principles of bankruptcy law as it would be for a bankruptcy court to decide a labor contract issue without accommodating competing principles of our national labor policy. Whatever the debtor-in-possession's technical breach of the NLRB's procedural rules, it does not excuse the agency's refusal to recognize the existence of the outstanding bankruptcy court order and to give some explanation why that order would be irrelevant to its proceedings.

We therefore conclude, for all the foregoing reasons, that the NLRB both erred as a matter of law and misused its discretion in granting the motion for summary judgment. Because the summary judgment included pre-petition charges as well as those relating to activities subsequent to the filing of the bankruptcy petition, it will be for the NLRB in the first instance to separate the two types of charges at any subsequent proceeding. Where charges of unfair labor practices arise both before and after the date of a Chapter 11 petition, the rejection of a collective bargaining agreement would not affect the obligations of the employer under § 8(d) prior to the date of the petition. We agree with the Board that a monetary

claim resulting from a Board order in such circumstances is governed by bankruptcy law and may be filed as the claim of a creditor in the bankruptcy court. *See* Reply Br. at 7.

It would seem, however, that the Board must await the determination of the bankruptcy court on remand before it may proceed to consider the post-petition charges. If under the precepts we announce today the bankruptcy judge again permits the rejection of the collective bargaining agreement, the Board will be bound by that determination, which would preclude any post-petition unfair labor practice arising from the rejected agreement.

VII.

The judgment of the district court at No. 81-2140 will be vacated and the cause remanded to it with a direction of a further remand to the bankruptcy judge for reconsideration in light of the foregoing. The NLRB's application for enforcement at No. 81-2238 will be denied without prejudice, for the reasons hereinabove expressed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-2140 and 81-2238

IN RE: BILDISCO, A General Partnership of the State of New Jersey,

LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, APPELLANT, No. 81-2140
NATIONAL LABOR RELATIONS BOARD, INTERVENOR

Appeal from the United States District Court for the District of New Jersey
(D.C. Civil No. 81-0513)

NATIONAL LABOR RELATIONS BOARD, PETITIONER, No. 81-2238

VS.

BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION, RESPONDENT

LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, INTERVENOR

National Labor Relations Board
Application for Enforcement

Present: ALDISERT, VAN DUSEN and GARTH, *Circuit Judges.*

JUDGMENT

These causes came on to be heard on the records from the United States District Court for the District of New Jersey and from the National Labor Relations Board and were argued by counsel on March 19, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered May 6, 1981, be, and the same is hereby vacated and the cause remanded to the said District Court for further remand to the Bankruptcy Court for reconsideration in light of the opinion of this Court.

It is further ordered and adjudged that the National Labor Relations Board's application for enforcement, filed August 6, 1981, be, and the same is hereby denied.

Costs taxed against petitioner in C.A. No. 81-2238.

ATTEST:

/s/ Sally Mrvos
Clerk

June 17, 1982

APPENDIX C

255 NLRB No. 154

FJZ

D—7640
Avenel, NJ

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 22—CA—10061

BILDISCO AND BILDISCO,
DEBTOR IN POSSESSION

and

LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION AND ORDER

Upon a charge and amended charges filed on June 3, July 16, and August 28, 1980, respectively, by Local 408, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, and duly served on Bildisco and Bildisco, Debtor in Possession, herein collectively called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 22, issued a complaint and notice of hearing on July 31, 1980, and a first amended complaint and notice of hearing on October 8, 1980, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8

(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charges and complaints and notices of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that the Union is the exclusive representative of certain of the Respondent's employees in a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act,[1] and that since on or about January 3, 1980, and at all times thereafter, Respondent has refused and is now refusing to bargain collectively with the Union by unilaterally changing existing terms and conditions of employment of its employees in the appropriate unit, as contained in its collective-bargaining agreement with the Union, regarding remittance of union dues, payment of pension, health, and welfare contributions, and payment of vacation benefits and wage increases. Respondent failed to file a timely answer to the complaint.

On February 2, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment based upon Respondent's failure to file an answer as required by Sections 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended. In a response to the General Counsel's motion, Respondent requested a 60-day stay of these proceedings to allow it to apply to the United States

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[1] All warehousemen, drivers and mechanics including straight truck drivers, outside field servicemen, order pickers, helpers, working foremen, employed at Respondents' Avenel place of business, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

Bankruptcy Court for authorization to retain special counsel to represent it in these proceedings. Counsel for the General Counsel opposed Respondent's request. Subsequently, on February 9, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Thereafter, Respondent filed a response to the Notice To Show Cause, including affirmative defenses, and counsel for the General Counsel filed a response to Respondent's response.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations, Series 8, as amended, provides as follows:

> The respondent shall, within 10 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

The complaints and notices of hearing served on Respondent herein specifically state that unless an answer to the complaint is filed within 10 days of service thereof "all of the allegations contained in the

Complaint shall be deemed to be admitted to be true and may be so found by the Board." Further, according to the uncontroverted allegations of the Motion for Summary Judgment, a Board agent met with Sal Valente, a general partner of Respondent, on September 24, 1980, and informed him of his obligation to file an answer, which was already past due, to the complaint issued on July 31. By letter dated October 27, 1980, a Board agent, confirming a telephone conversation of that date, advised Valente that no answer had been received to the first amended complaint and that summary judgment would be sought if no answer was received by October 31, 1980.

In its response to the Notice To Show Cause, Respondent states that its failure to file an answer was due to the disruption in its operations caused by its reorganization proceedings in the United States Bankruptcy Court. Respondent further states that it is currently attempting to obtain court approval to retain special labor counsel but has not to date received the requisite order from the court. In his response, counsel for the General Counsel states, as he did in his response to Respondent's letter of January 29, 1981, that Respondent had more than 6 months to file an answer or seek an extension of time to file an answer in order to obtain court authorization to employ labor counsel, and failed to do so.

As indicated above, Respondent was served with the complaint and first amended complaint on July 31 and October 8, 1980, respectively, at which times it was engaged in proceedings before the bankruptcy court. It was notified several times of its obligation to file an answer or to request an extension of time to do so, but failed to do either. The response to the Notice To Show Cause does not explain why Re-

spondent failed to contact the Regional Office concerning an answer or an extension of time to file an answer. Accordingly, we find that Respondent's response does not constitute good cause under our rules for its failure to file a timely answer.[2] Therefore, in accordance with the rule set forth above, the allegations of the first amended complaint are deemed to be admitted to be true and are so found by the Board, and the General Counsel's Motion for Summary Judgment is granted.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of Respondent

Bildisco, a partnership duly organized under, and existing by virtue of, the laws of the State of New Jersey, with its principal office and place of business in Avenel, New Jersey, is and has been at all times material herein continuously engaged in the retail and wholesale sale and distribution of building and supply products. During the 12-month period ending June 3, 1980, Bildisco caused to be purchased, transferred, and delivered to the Avenel place of business building supplies and other materials valued in excess of $50,000, of which goods and materials valued in excess of $50,000 were transported to the Avenel place of business directly from points outside the State of New Jersey. Since on or about April 17, 1980, Bildisco has been duly designated as Debtor-in-Possession for Bildisco pursuant to a voluntary arrangement pro-

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[2] See *World Services Corporation and/or Peggs Coal Company; and World Services Corporation, Debtor In Possession*, 247 NLRB No. 201 (1980); *Evans Express Company, Inc. and Intercontinental Systems, Inc.*, 232 NLRB 655 (1977).

ceeding in the United States Bankruptcy Court of the District of New Jersey, and as such has full authority to continue the operation of and exercise all powers necessary to the administration of the business of Bildisco.

We find, on the basis of the foregoing, that Bildisco, Debtor-in-Possession, is, and has been at all times material herein since April 17, 1980, an alter ego in bankruptcy to Bildisco and that Bildisco and Bildisco, Debtor-in-Possession, collectively called Respondent, is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Local 408, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All warehousemen, drivers and mechanics including straight truck drivers, outside field service men, order pickers, helpers, working foremen, employed at Respondent's Avenel place of business, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

On or before May 1, 1979, a majority of the employees of Respondent in the unit described above designated and selected the Union as their representative for the purpose of collective bargaining, and since on or before May 1, 1979, the Union has been and is now, pursuant to Section 9(a) of the Act, the exclusive representative of the employees in the unit described above for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment. As a result of the representative status of the Union, Respondent and the Union have entered into successive collective-bargaining agreements, the most recent of which is effective from May 1, 1979, through April 30, 1982.

Since on or about January 3, 1980, Respondent has unilaterally changed existing terms and conditions of employment of its employees in the unit described above by failing and refusing to: make required pension, health, and welfare contributions; remit to the Union the dues withheld from the pay of employees; and pay vacation benefits, all as required by the collective-bargaining agreement described above. Since on or about May 1, 1980, Respondent has unilaterally changed existing terms and conditions of employment of its employees in the unit described by failing and refusing to pay wage increases as required by the collective-bargaining agreement.

Accordingly, we find that by the aforesaid conduct Respondent has failed and refused, and is now failing and refusing, to bargain collectively with the Union as the exclusive representative of its employees in the appropriate unit. By such conduct, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Such affirmative action shall include that Respondent recognize and deal with the Union as the exclusive bargaining representative of its employees in the appropriate unit by honoring the collective-bargaining agreement executed by it on May 1, 1979, in all its terms.

Additionally, we have found that Respondent has made unilateral changes in certain terms and conditions of employment in violation of Section 8(a)(5) and (1) of the Act. In order to dissipate the effect of these unfair labor practices, we shall order Respondent to make whole its employees by making the required pension, health, and welfare contributions that it has failed to pay since January 3, 1980,[3] re-

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[3] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of

mitting to the Union the dues it has withheld from its employees' paychecks since January 3, 1980, paying the vacation benefits it has failed to pay since January 3, 1980, and paying the wage increases it has failed to pay since May 1, 1980, plus interest on the dues, vacation benefits, and wage increases as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[4]

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Bildisco and Bildisco, Debtor-in-Possession, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 408, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of

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interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance stage the question of whether Respondent must pay any additional amounts into the benefit funds in order to satisfy our "make-whole" remedy. These additional amounts may be determined, depending upon the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. See *Merryweather Optical Company*, 240 NLRB 1213, 1216, fn. 7 (1979).

[4] See *Ogle Protection Service, Inc. and James L. Ogle*, 183 NLRB 682, 683 (1970); and see, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). In accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB No. 11 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All warehousemen, drivers and mechanics including straight truck drivers, outside field service men, order pickers, helpers, working foremen, employed at Respondent's Avenel place of business, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein, the above-named labor organization has been and now is the exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By unilaterally failing and refusing, since on or about January 3, 1980, and at all times thereafter, to make required pension, health, and welfare contributions, to remit to the Union the dues withheld from its employees' pay, and to pay vacation benefits, and by unilaterally failing and refusing since on or about May 1, 1980, and at all times thereafter, to pay wage increases to its employees, all as required by its collective-bargaining agreement with the Union, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Rela-

tions Board hereby orders that the Respondent, Bildisco and Bildisco, Debtor-in-Possession, Avenel, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the Union as the exclusive bargaining representative of its employees in the following appropriate unit:

> All warehousemen, drivers and mechanics including straight truck drivers, outside field service men, order pickers, helpers, working foremen, employed at Respondent's Avenel place of business, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Failing and refusing to make pension, health, and welfare contributions, to remit to the Union dues withheld from its employees' pay, to pay vacation benefits, and to pay wage increases, all as required by its collective-bargaining agreement with the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Recognize and bargain with the Union as the exclusive representative of its employees in the aforesaid appropriate unit by honoring the collective-bargaining agreement executed by it on May 1, 1979, in all its terms.

(b) Make whole its employees, in the manner set forth in the section of this Decision entitled "The Remedy," by making the required pension and health

and welfare contributions it has failed to pay since January 3, 1980, by remitting to the Union the dues it has withheld from its employees' pay since January 3, 1980, plus interest, by paying the vacation benefits it has failed to pay since January 3, 1980, plus interest, and by paying to employees any wage increases it has failed to pay since May 1, 1980, plus interest, all as required by its collective-bargaining agreement with the Union.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of money due under the terms of this Order.

(d) Post at its Avenel, New Jersey, place of business copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(e) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. April 23, 1981.

JOHN H. FANNING, Chairman

HOWARD JENKINS, JR., Member

DON A. ZIMMERMAN, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with Local 408, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of all warehousemen, drivers, and mechanics including straight truck drivers, outside field service men, order pickers, helpers, working foremen, employed at our Avenel place of business, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally change existing terms and conditions of employment of our employees in the above-described unit by failing and refusing to make pension, health, and welfare contributions, to remit to the Union the dues withheld from our employees' pay, to pay vacation benefits, and to grant wage increases, all as required by our collective-bargaining agreement with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL recognize and bargain with the Union as the exclusive representative of our employees in the above-described unit by honoring the collective-bargaining agreement executed by us on May 1, 1979, in all its terms.

WE WILL make whole our employees by making the pension and health and welfare contributions we have failed to pay since January 3, 1980, by remitting to the Union the dues we have withheld from our employees' pay since January 3, 1980, plus interest, by paying the vacation benefits we have failed to pay since January 3, 1980, plus interest, and by paying our employees any wage increases we have failed to pay since May 1, 1980, plus interest, all as required by our collective-bargaining agreement with the Union.

BILDISCO AND BILDISCO,
DEBTOR-IN-POSSESSION
(Employer)

Dated ..... By .....
(Representative) (Title)

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 81-513

IN RE:

BILDISCO, A General Partnership of
the State of New Jersey

May 4, 1981
Trenton, New Jersey

OPINION

BEFORE:

THE HONORABLE ANNE E. THOMPSON, U.S.D.J.

APPEARANCES:

ZAZZALI, ZAZZALI & KROLL, ESQS.
By: ALBERT G. KROLL, ESQ.
For Local 408

RAVIN, KATCHEN & GREENBERG, ESQS.
By: JACK M. ZACKIN, ESQ.
For the Debtor

VINCENT RUSSONIELLO, C.S.R.
Official Court Reporter

THE COURT: This is an appeal from an Order of the United States Bankruptcy Court for the District of New Jersey filed on January 15, 1981. In that order, the Bankruptcy Court granted the motion

of Bildisco, Debtor in Possession, to reject a May 1, 1979 collective bargaining agreement between Bildisco and Local 408, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Union"). An appeal to this Court from that order followed.

The standard under which we must review a ruling by the Bankruptcy Court is set out in Rule 810 of the Rules of Bankruptcy Procedure:

> Upon an appeal the district judge may affirm, modify or reverse a referee's judgment or order, or remand with instructions for further proceedings. The court shall accept the referee's findings of fact unless they are clearly erroneous, and shall give due regard to the opportunity of the referee to judge the credibility of the witnesses.

"If there is a reasonable basis in the record for a bankruptcy judge's ultimate findings of fact, a reviewing court cannot substitute its own ultimate findings of fact simply because it regards its views as effecting a more desirable result than that reached by the bankruptcy judge." *In re Botany Industries*, 463 F. Supp. 793, 795 (ED Pa. 1978); *In re Hollock*, 1 B.R. 212, (M.D. Pa. 1979). As a practical matter, what this means is that a

> finding is "clearly erroneous" when although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed.

United States v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *In re Knight*, 421 F. Supp. 1387, 1390 (M.D.La.) (1976).

Under Section 365 of the Bankruptcy Code, 11 U.S.C. § 365, a trustee or a debtor in possession is

given the right to reject executory contracts in this language:

> Except as provided (elsewhere), the trustee subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

The case of *Shopmen's Union No. 455* v. *Kevin Steel Products*, 519 F. 2d 698 (2d Cir. 1975) was the leading opinion dealing with the rejection of collective bargaining agreements under the old Bankruptcy Act. Under the new Bankruptcy Code, is is not settled whether the standards developed in *Kevin Steel* and those cases which followed it are still applicable to the rejection of executory contracts. Because we find that the lower court's order meets both the old and the proposed new standards, we do not find it necessary to resolve this question.

If Section 365 does not incorporate the *Kevin Steel* standard, then it is likely that collective bargaining agreements will not be treated any differently under § 365 than any other executory contracts. This being so, the so-called "business judgment test" for their rejection would apply. Under this test, "(i)t is enough, as a matter of business judgment, rejection of the burdensome contract may benefit the estate." *Matter of Minges*, 602 F. 2d 38, 43 (2d Cir. 1979).

Under the record as it stands we find ample justification for the Bankruptcy Court to make the finding that a rejection by the debtor of the collective bargaining agreement would be a sound exercise of its business judgment. Rejection would result in a savings of approximately $100,000. (T. 7) This alone would appear to justify rejection under the "business judgment" test.

On the other hand, it may be that Congress intended to preserve the special treatment accorded to collective bargaining agreements under former Section 313, (now 365). As set forth in *Kevin Steel* and its progeny,

> The cases suggest that a two step analysis be employed by the bankruptcy court in deciding whether to permit rejection of a collective bargaining agreement . . . (citations omitted) . . . First, the court should determine that the agreement is onerous and burdensome to the estate, so that failure to reject will make a successful arrangement impossible. Second, the equities must be balanced and found to favor the debtor.

Matter of Alan Wood Steel Co., 449 F. Supp. 165, 169 (E.D. Pa. 1978).

The Bankruptcy Court did not make a specific finding as to the test to be applied in the rejection of the collective bargaining agreement. It merely notes that "this is not a case under the Bankruptcy Act; it is under the Bankruptcy Code." (Tr. 36). However, we feel that there was evidence before the Bankruptcy Court upon which it could reasonably base the findings required by the *Kevin Steel* test, and therefore, we cannot say that its ruling was "clearly erroneous."

First, the Court heard testimony that the creditors who approved the plan believed that the rejection of the union contract was "highly involved" with the success of the plan. (Tr. 8) The Court itself noted that the testimony established that rejection would save the debtor some $100,000 per year. (Tr. 31) Therefore, the Court did have a basis upon which it could find that the collective bargaining agreement was burdensome to the debtor.

Second, the Court did weigh the equities in this matter. It noted that

> the union and the employes have a right to claim damages as a result of the rejection of the contract. They can file a complaint for the purpose of having damages fixed . . . and there will have to be a trial on the damages to ascertain what the damages will be.

(Tr. 32)

The transcript of the hearing in this matter reveals that the Court found that the collective bargaining agreement was burdensome to the debtor, and that it would be to his distinct advantage to reject the agreement. Furthermore, the Court found that although the union and the employees would suffer injury as a result of the rejection, given their right to seek damages, the injury which they would suffer would not outweigh the advantage to the debtor from rejection.

Because we believe that there exists ample evidence in the record—and we note as the Bankruptcy Court did that the moving party's evidence was uncontradicted by the opposing side—to support the order below, we do not believe that any error was committed by the Bankruptcy Judge. Accordingly, the order will be affirmed.

The Court will enter an appropriate form of order.

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 81-513

IN THE MATTER OF:

BILDISCO, A General Partnership
of the State of New Jersey, DEBTOR

ORDER AFFIRMING JANUARY 15, 1981
ORDER OF BANKRUPTCY COURT

This matter being brought before the Court on appeal from an order granting the motion of the Debtor in Possession, Bildisco, to reject the Executory Contract dated May 1, 1979 with Teamsters Union Local No. 408 brought by Local 408, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, by Zazzali, Zazzali & Kroll, P.A., Albert G. Kroll, Esquire, appearing; and Ravin, Katchen & Greenberg, P.A., counsel for Bildisco, Jack M. Zackin, Esquire, appearing; and the Court, having considered the arguments of counsel and the papers submitted; it is on this 5th day of May, 1981,

ORDERED that the order entered in this matter on January 15, 1981, granting the motion of the debtor in possession to reject the Executory Contract be and hereby is affirmed.

[Filed May 6, 1981]

/s/ Anne E. Thompson
ANNE E. THOMPSON
U.S.D.J.

APPENDIX F

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

No. 80-07283

IN THE MATTER OF:

BILDISCO, A General Partnership
of the State of New Jersey, DEBTOR

In Proceedings for a Reorganization under
Chapter 11 of the Bankruptcy Code

ORDER

This matter being opened to the Court by Ravin Katchen & Greenberg, P.A. on the return date of Notice to Reject Executory Union Contract with Teamsters Union Local No. 408, in the presence of Zazzali, Zazzali & Kroll, Esqs, the Court having considered the testimony and evidence presented, and having considered the arguments of counsel in opposition to the Motion of the Debtor, and due cause appearing;

IT IS on this 15th day of January 1981;

ORDERED:

1. That the Motion of the Debtor in Possession to reject Executory Union Contract dated May 1, 1979 with Teamsters Union Local No. 408, be and hereby is granted.

2. That said Teamsters Union Local No. 408 shall be allowed thirty (30) days from the date of entry of the within Order to file its claim for damages, if any, resulting from such rejection.

/s/ Amel Stark
Bankruptcy Judge

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 0-364-343 1181

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Office-Supreme Court, U.S.
FILED
APR 14 1983
ALEXANDER L. STEVAS,
CLERK

Nos. 82-818, 82-852

In the Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION, ET AL.

AND

LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

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PETITIONS FOR CERTIORARI FILED NOVEMBER 15, 1982
CERTIORARI GRANTED JANUARY 17, 1983

In the Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION, ET AL.

AND

LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES
(National Labor Relations Board)

Bildisco and Bildisco, Debtor-In-Possession
Board Case No. 22-CA-10061

DATE	PROCEEDINGS
6.3.80	Charge
7.16.80	First Amended Charge
7.31.80	Complaint and Notice of Hearing
8.28.80	Second Amended Charge
10.8.80	First Amended Complaint and Notice of Hearing
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2.2.81	Order Postponing Hearing Indefinitely
2.2.81	Letter from Counsel for Bildisco requesting that both the Motion for Summary Judgment and the hearing on the complaint be adjourned for a period of 60 days
2.5.81	Letter from Counsel for the General Counsel in opposition to Bildisco's request for a 60-day adjournment of Motion for Summary Judgment
2.9.81	Order Transferring Proceeding to the Board and Notice to Show Cause
2.20.81	Bildisco's Response to Notice to Show Cause
2.25.81	General Counsel's Response to Bildisco's Response to Notice to Show Cause
4.23.81	Board's Decision and Order
5.28.81	Board's letter to Counsel for Bildisco returning Notice of Motion for Reconsideration and Memo in Support as untimely submitted

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES
(D. N. J.)

In Re: Bildisco, A General Partnership
of the State of New Jersey
Docket No. 80-02 783

DATE	PROCEEDINGS
4.14.80	Bankruptcy Petition Filed
1.5.81	Motion to Bankruptcy Court to Reject Collective Bargaining Agreement
1.15.81	Bankruptcy Court Order granting motion to reject collective bargaining agreement
5.6.81	Order of District Court affirming January 15, 1981 order of Bankruptcy Court
	* * * *
6.17.82	Decision of Court of Appeals reversing and remanding April 23, 1981 order of National Labor Relations Board and May 6, 1981 order of District Court
1.17.83	Order of Supreme Court granting petitions for certiorari

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
TWENTY-SECOND REGION

Case No. 22-CA-10061

BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION

AND

LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

COMPLAINT AND NOTICE OF HEARING

It having been charged by Local 408, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, of 907 Morris Avenue, Union, New Jersey 07083, herein called the Union, that Bildisco and Bildisco, Debtor-in-Possession, of P.O. Box B, Rahway, New Jersey, have engaged in and are now engaging in certain unfair labor practices affecting commerce, as set forth and defined in the National Labor Relations Act, 29 U.S.C. Sec. 151 *et seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, on behalf of the National Labor Relations Board, herein called the Board, by the undersigned Acting Regional Director for the Twenty-second Region, pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, 29 C.F.R. Sec.102, *et seq.*, hereby issues this Complaint and Notice of Hearing, and alleges as follows:

1. (a) The Charge in this proceeding was filed on June 3, 1980.

(b) A copy of the Charge in this proceeding was served by registered mail upon Bildisco on June 4, 1980 and on Bildisco, Debtor-in-Possession on July 21, 1980.

(c) The First Amended Charge in this proceeding was filed on July 16, 1980.

(d) A copy of the First Amended Charge in this proceeding was served by certified mail upon Bildisco on July 16, 1980.

(e) A copy of the First Amended Charge in this proceeding was served by certified mail upon Bildisco Debtor-in-Possession on July 16, 1980.

2. Bildisco is, and has been at all times material herein, a partnership duly organized under, and existing by virtue of, the laws of the State of New Jersey.

3. At all times material herein, Bildisco has maintained its principal office and place of business at Cragwood Road, Avenel, New Jersey, herein called the Avenel place of business, and at all times material herein has been continuously engaged in the retail and wholesale sale and distribution of building supply products. Bildisco's Avenel place of business is its only facility involved in this proceeding.

4. In the course and conduct of Bildisco's business operations during the twelve months preceding June 3, 1980, which operations are representative of its operations at all times material herein, Bildisco caused to be purchased, transferred and delivered to the Avenel place of business, buidling supplies and other materials valued in excess of $50,000, of which, goods and materials valued in excess of $50,000 were transported to the Avenel place of business in interstate commerce directly from states of the United States other than the State of New Jersey.

5. Bildisco is and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

6. (a) Since on or about April 14, 1980, Bildisco has been subject to a voluntary arrangement proceeding pursuant to Chapter 11 of the Bankruptcy Act, 29 U.S.C. Sec. 1101, *et seq.*, in the United States Bankruptcy Court for the District of New Jersey.

(b) Since on or about April 17, 1980, Bildisco has been duly designated as Debtor-In-Possession for Bildisco pursuant to the arrangement described above in paragraph 6(b), and as such, has full authority to continue the operation of and exercise all powers necessary to the administration of the business of Bildisco.

7. By virtue of the events described above in paragraph 6, Bildisco, Debtor-in-Possession is, and has been at all times material herein, since April 17, 1980, an alter ego in

bankruptcy to Bildsico. Bildisco and Bildisco, Debtor-in-Possession are together referred to as Respondent herein.

8. The Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

9. At all times material herein, the following named persons have occupied the positions with Respondent set forth below opposite their respective names:

Sal Valente, General Partner
Arthur Gershon, General Partner
Joan Burchfield, Bookkeeper

10. At all times material herein, Sal Valente and Arthur Gershon, referred to above in paragraph 9, have been and are now supervisors within the meaning of Section 2(11) of the Act, and all of the persons named above in paragraph 9 have been and are now agents within the meaning of Section 2(13) of the Act, acting on behalf of Respondent.

11. All warehousemen, drivers and mechanics including straight truck drivers, outside field service men, order pickers, helpers, working foremen, employed at Respondent's Avenel place of business, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

12. On or before May 1, 1979 a majority of the employees of Respondent in the unit described above in paragraph 11, designated and selected the Union as its representative for the purposes of collective bargaining with Respondent.

13. At all times since on or before May 1, 1979, the Union has been and is now, pursuant to Section 9(a) of the Act, the exclusive representative of the employees in the unit described above in paragraph 11 for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

14. As a result of the respresentative status of the Union described above in paragraph 13, Respondent and the Union have entered successive collective bargaining agree-

ments, the most recent of which is effective from May 1, 1979 through April 30, 1982.

15. Since on or about January 3, 1980, Respondent has unilaterally changed existing terms and conditions of employment of its employees employed in the unit described above in paragraph 11 by failing and refusing to make the required pension, health and welfare contributions as required by the collective bargaining agreement described above in paragraph 14.

16. Since on or about January 3, 1980, Respondent has unilaterally changed existing terms and conditions of employment of its employees by failing and refusing to remit to the Union, dues withheld from the pay of employees in the unit described above in paragraph 11 as required by the collective bargaining agreement described above in paragraph 14.

17. Since on or about May 1, 1980, Respondent has unilaterally changed existing terms and conditions of employment of its employees employed in the unit described above in paragraph 11 by failing and refusing to pay wage increases to its employees in the unit described above in paragraph 11 as required by the collective bargaining agreement described above in paragraph 14.

18. By the acts described above in paragraphs 15, 16 and 17, and by each of those acts, Respondent did refuse, and is now refusing to bargain collectively with the Union, the representative of its employees, and Respondent thereby did engage in, and is now engaging in, unfair labor practices within the meaning of Section 8(a)(5) of the Act.

19. By the acts described above in paragraphs 15, 16 and 17, and by each of those acts, Respondent did interfere with, restrain and coerce, and is now interfering with, restraining and coercing, its employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and Respondent thereby did engage in, and is now engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

20. The activities of Respondent, described above in paragraphs 15 through 19, occurring in connection with the operations of Respondent, described above in paragraphs 2

through 7, have a close, intimate and substantial relation to trade, traffic and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 8(a)(1) and (5), and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 9th day of March, 1981 at 11:00 a.m. in the Federal Building, Room 1600, 970 Broad Street, Newark, New Jersey 07102, a hearing will be conducted before a duly designated Administrative Law Judge of the Board of the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person or otherwise and to give testimony. Form NLRB-4668, Summary of Standard Procedures in Formal Hearings Held before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

PLEASE TAKE FURTHER NOTICE that, pursuant to Section 102.20 and Section 102.21 of the Board's Rules and Regulations, Respondent shall file with the undersigned Acting Regional Director, acting in this matter as agent of the Board, an original and four (4) copies of an Answer to the Complaint within ten (10) days from service thereof, and that, unless it does so, all of the allegations contained in the Complaint shall be deemed to be admitted to be true and may be so found by the Board. Immediately upon the filing of its Answer, Respondent shall serve a copy thereof on each of the other parties.

WHEREFORE, the General Counsel of the Board, on behalf of the Board, by the Acting Regional Director for the Twenty-second Region, on this 31st day of July, 1980, issues this Complaint and Notice of Hearing against BILDISCO, and BILDISCO, DEBTOR-IN-POSSESSION, Respondent herein.

/s/ WILLIAM A. PASCARELL

WILLIAM A. PASCARELL,
Acting Director
National Labor Relations Board
Twenty-second Region
970 Broad Street
Newark, New Jersey 07102

Attachment

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
TWENTY-SECOND REGON

Case No. 22-CA-10061

BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION

AND

LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

FIRST AMENDED COMPLAINT AND NOTICE OF HEARING

It having been charged by Local 408, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, of 1907 Morris Avenue, Union, New Jersey 07083, herein called the Union, that Bildisco and Bildisco, Debtor-in-Possession, of P.O. Box B, Rahway, New Jersey, have engaged in and are now engaging in certain unfair labor practices affecting commerce, as set forth and defined in the National Labor Relations Act, 29 U.S.C. Sec. 151 *et seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, on behalf of the National Labor Relations Board, herein called the Board, by the undersigned Regional Director for the Twenty-second Region, pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, 29 C.F.R. Sec. 102, *et seq.*, hereby issues this First Amended Complaint and Notice of Hearing, and alleges as follows:

1. (a) The Charge in this proceeding was filed on June 3, 1980.

(b) A copy of the Charge in this proceeding was served by registered mail upon Bildisco on June 4, 1980 and on Bildisco, Debtor-in-Possession on July 21, 1980.

(c) The First Amended Charge in this proceeding was filed on July 16, 1980.

(d) A copy of the First Amended Charge in this proceeding was served by certified mail upon Bildisco on July 16, 1980.

(e) A copy of the First Amended Charge in this proceeding was served by certified mail upon Bildisco Debtor-in-Possession on July 16, 1980.

(f) The Second Amended Charge in this proceeding was filed on August 28, 1980.

(g) A copy of the Second Amended Charge in this proceeding was served by certified mail upon Bildisco, and Bildisco, Debtor-in-Possession on August 28, 1980.

2. Bildisco is, and hs been at all times material herein, a partnership duly organized under, and existing by virtue of, the laws of the State of New Jersey.

3. At all times material herein, Bildisco has maintained its principal office and place of business at Cragwood Road, Avenel, New Jersey, herein called the Avenel place of buisness, and at all times material herein has been continuously engaged in the retail and wholesale sale and distribution of building supply products. Bildisco's Avenel place of business is its only facility involved in this proceeding.

4. In the course and conduct of Bildisco's business operations during the twelve months preceding June 3, 1980, which operations are representative of its operations at all times material herein, Bildisco caused to be purchased, transferred and delivered to the Avenel place of business, building supplies and other materials valued in excess of $50,000, of which, goods and materials valued in excess of $50,000 were transported to the Avenel place of business in interstate commerce directly from states of the United States other than the State of New Jersey.

5. Bildisco is and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

6. (a) Since on or about April 14, 1980, Bildisco has been subject to a voluntary arrangement proceeding pursuant to Chapter 11 of the Bankruptcy Act, 29 U.S.C. Sec. 1101, *et seq.*, in the United States Bankruptcy Court for the District of New Jersey.

(b) Since on or about April 17, 1980, Bildisco has been duly designated as Debtor-in-Possession for Bildisco pursuant to the arrangement described above in paragraph 6(a), and as such, has full authority to continue the operation of and exercise all powers necessary to the administration of the business of Bildisco.

7. By virtue of the events described above in paragraph 6, Bildisco, Debtor-in-Possession is, and has been at all times material herein, since April 17, 1980, an alter ego in bankruptcy to Bildisco. Bildisco and Bildisco, Debtor-in-Possession are together referred to as Respondent herein.

8. The Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

9. At all times material herein, the following named persons have occupied the positions with Respondent set forth below opposite their respective names:

Sal Valente—General Partner
Arthur Gershon—General Partner
Joan Burchfield—Bookkeeper

10. At all times material herein, Sal Valente and Arthur Gershon, referred to above in paragraph 9, have been and are now supervisors within the meaning of Section 2(11) of the Act, and all of the persons named above in paragraph 9 have been and are now agents within the meaning of Section 2(13) of the Act, acting on behalf of Respondent.

11. All warehousemen, drivers and mechanics including straight truck drivers, outside field service men, order pickers, helpers, working foremen, employed at Respondent's Avenel place of business, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

12. On or before May 1, 1979, a majority of the employees of Respondent in the unit described above in paragraph 11, designated and selected the union as its representative for the purposes of collective bargaining with Respondent.

13. At all times since on or before May 1, 1979, the Union has been and is now, pursuant to Section 9(a) of the

Act, the exclusive representative of the employees in the unit described above in paragraph 11 for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

14. As a result of the representative status of the Union described above in paragraph 13, Respondent and the Union have entered successive collective bargaining agreements, the most recent of which is effective from May 1, 1979 through April 30, 1982.

15. Since on or about January 3, 1980, Respondent has unilaterally changed existing terms and conditions of employment of its employees employed in the unit described above in paragraph 11 by failing and refusing to make the required pension, health and welfare contributions as required by the collective bargaining agreement described above in paragraph 14.

16. Since on or about January 3, 1980, Respondent has unilaterally changed existing terms and conditions of employment of its employees by failing and refusing to remit to the Union, dues withheld from the pay of employees in the unit described above in paragraph 11 as required by the collective bargaining agreement described above in paragraph 14.

17. Since on or about January 3, 1980, Respondent has unilaterally changed existing terms and conditions of employment of its employees employed in the unit described above in paragraph 11 by failing and refusing to pay vacation benefits as required by the collective bargaining agreement described above in paragraph 14.

18. Since on or about May 1, 1980, Respondent has unilaterally changed existing terms and conditions of employment of its employees employed in the unit described above in paragraph 11 by failing and refusing to pay wage increases to its employees in the unit described above in paragraph 11 as required by the collective bargaining agreement described above in paragraph 14.

19. By the acts described above in paragraphs 15 through 18, and by each of those acts, Respondent did refuse, and is now refusing to bargain collectively with the

Union, the representative of its employees, and Respondent thereby did engage in, and is now engaging in, unfair labor practices within the meaning of Section 8(a)(5) of the Act.

20. By the acts described above in paragraphs 15 through 18, and by each of those acts, Respondent did interfere with, restrain and coerce, and is now interfering with, restraining and coercing, its employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and Respondent thereby did engage in, and is now engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

21. The activities of Respondent, described above in paragraphs 15 through 20, occurring in connection with the operations of Respondent, described above in paragraphs 2 through 7, have a close, intimate and substantial relation to trade, traffic and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 8(a)(1) and (5), and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 9th day of March, 1981 at 11:00 a.m. in the Federal Building, Room 1600, 970 Broad Street, Newark, New Jersey 07102, a hearing will be conducted before a duly designated Administrative Law Judge of the Board on the allegations set forth in the above First Amended Complaint, at which time and place you will have the right to appear in person or otherwise and to give testimony. Form NLRB-4668, Summary of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

PLEASE TAKE FURTHER NOTICE that, pursuant to Section 102.20 and Section 102.21 of the Board's Rules and Regulations, Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the Board, an original and four (4) copies of an Answer to the First Amended Complaint within ten (10) days from service thereof, and that, unless it does so, all of the allegations contained in the Complaint shall be deemed to be admitted

to be true and may be so found by the Board. Immediately upon the filing of its Answer, Respondent shall serve a copy thereof on each of the other parties.

WHEREFORE, the General Counsel of the Board, on behalf of the Board, by the Regional Director for the Twenty-second Region, on this 8th day of October, 1980, issues this First Amended Complaint and Notice of Hearing against Bildisco, and Bildisco, Debtor-in-Possession, Respondent herein.

/S/ ARTHUR EISENBERG

ARTHUR EISENBERG
Regional Director
National Labor Relations Board
Twenty-second Region
970 Broad Street
Newark, New Jersey 07102

Attachment

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 22-CA-10061

BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION

AND

LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

MOTION TO THE NATIONAL LABOR RELATIONS BOARD FOR SUMMARY JUDGMENT

The General Counsel of the National Labor Relations Board, by the undersigned counsel for the General Counsel, hereby moves, pursuant to Section 102.24 of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, 29 C.F.R. Section 102, *et seq.*, for summary judgment in the above-captioned case, against Respondent, Bildisco and Bildisco, Debtor-In-Possession, based upon the failure of Respondent to file an Answer to the Complaint in this case as required by Section 102.20 and 102.21 of the Board's Rules and Regulations, and for such other and further relief as may be proper in the circumstances.

A Memorandum setting forth the grounds relied upon in support of this Motion is filed herewith.

Dated at Newark, New Jersey, this 27th day of January, 1981.

/s/ MARGUERITE R. GREENFIELD

MARGUERITE R. GREENFIELD
Counsel of the General Counsel
National Labor Relations Board
Twenty-Second Region
970 Broad Street
Newark, New Jersey 07102

Ravin, Katchen & Greenberg
A Professional Corporation
Counselors at Law

January 29, 1981

National Newark & Essex Building
744 Broad Street
Newark, New Jersey 07102
Suite 3200
(201) 642-1540

Robert Volger, Acting Executive Secretary
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

Re: Bildisco and Bildisco,
Debtor in Possession
Case No. 22-CA-10061

Dear Mr. Volger:

This firm is counsel to Bildisco, Debtor in Possession in Proceedings for Reorganization pursuant to Chapter 11 of the Bankruptcy Code. We are in receipt of the Motion of the General Counsel of the National Labor Relations Board for Summary Judgment with reference to the above captioned case.

Please be advised that Bildisco is in the process of obtaining special counsel to represent it in connection with the pending proceeding before the National Labor Relations Board. Employment of such special counsel must be authorized by Order of the United States Bankruptcy Court for the District of New Jersey, before which the Reorganization Proceedings are pending.

In light of the above, we request, on behalf of Bildisco and Bildisco, Debtor in Possession, that both the Motion for Summary Judgment and the hearing on the Complaint scheduled for March 9, 1981 be adjourned for a period of sixty days to allow the Debtor in Possession to make appropriate application to the Bankruptcy Court for authorization to retain special counsel to represent them before the National Labor Relations Board.

Very truly yours,

/s/ JACK M. ZACKIN
JACK M. ZACKIN

JMZ:AM
CC: MARGUERITE R. GREENFIELD, ESQ.
ALBERT G. KROLL, ESQ.
MR. SAL VALENTE
LOCAL 408 A/W INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMENT AND HELPERS OF AMERICA

NATIONAL LABOR RELATIONS BOARD
REGION 22
Federal Building, 970 Broad Street
Newark, New Jersey 07102

February 3, 1981

John C. Gruesdale
Executive Secretary
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

Re: Bildisco and Bildisco
Debtor in Possession
Case No. 22-CA-10061

Dear Mr. Truesdale:

Please be advised that Counsel for the General Counsel in the above matter opposes Respondent's request for a sixty day adjournment of General Counsel's Motion for Summary Judgment filed on January 27, 1981, to enable Respondent to obtain persmission from the United States Bankruptcy Court to obtain labor counsel for this proceeding.

As in demonstrated by the exhibits filed with General Counsel's Motion, Bildisco and Bildisco Debtor in Possession, the parties named in the bankruptcy proceeding were named and served with the original charge in June 1980 as well as with the Complaint and First Amended Complaint in July and October 1980. Those exhibits further reveal that counsel for Respondent was served with both the Complaint and the First Amended Complaint. Thus, Respondent's counsel has had more than six months to file an answer or to seek an extension of time to file an answer in order to obtain the Court's authorization to employ labor counsel, and has failed to do so.

Accordingly, Respondent's untimely request should be rejected and General Counsel's Motion for Summary Judgment should be granted.

Very truly yours,

/s/ MARGUERITE R. GREENFIELD
MARGUERITE R. GREENFIELD
Counsel for the General Counsel

cc: *CERTIFIED MAIL*

Albert G, Kroll, Esq.
Zazzali,Zazzali & Whimpple
Gateway I
Newark, New Jersey 07102

Bildisco and Bildisco,
Debtor-In-Possession
Craigwood Road
Avenel, New Jersey

Bildisco and Bildisco
Debtor-In-Possession
P.O. Box B
Rahway, New Jersey 07065

Richard Honig, Esq.
Ravin, Katchen & Greenburg
744 Broad Street
Newark, New Jersey 07102

REGULAR MAIL

Local 408 a/w International
Brotherhood of Teamsters,
Chauffeurs, Warehousemen
and Helpers of America
1907 Morris Avenue
Union, New Jersey 07083

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 22-CA-10061

BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION

AND

LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

ORDER TRANSFERRING PROCEEDING TO THE BOARD AND NOTICE TO SHOW CAUSE

On July 31, 1980, the Acting Regional Director for Region 22 of the National Labor Relations Board issued a Complaint and Notice of Hearing and, on October 8, 1980, the Regional Director issued a First Amended Complaint and Notice of Hearing in the above-entitled proceeding, alleging that the Respondent has engaged in and is engaging in certain unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the National Labor Relations Act, as amended.

Thereafter, on February 2, 1981, the General Counsel, by counsel, filed with the Board in Washington, D.C., a Motion to the National Labor Relations Board for Summary Judgment and a Memorandum in support thereof, with exhibits attached. The General Counsel submits that Respondent failed to file an answer within the 10 days specified by the complaint and first amended complaint, that by letter dated October 27, 1980, Respondent was advised that summary judgment would be sought if no answer was received by October 31, 1980, and that Respondent has failed to file any answer in this preceeding as required by the Board's Rules and Regulations. He submits that as Respondent has failed to admit, deny, affirm or in any way answer the charges alleged therein and disregarded opportunities extending the time for the filing of an answer that the allega-

tions of the first amended complaint should be deemed admitted and found by the Board to be true. He therefore requests the Board to enter summary judgment against Respondent and issue an appropriate remedial order which would require the Respondent to cease and desist from engaging in the unlawful conduct alleged in the amended complaint, and grant such affirmative relief, incuding payment of the required pension, health and welfare contributions and remission of withheld dues to Local 408, payment of vacation benefits and wage increases to unit employees and the posting of an appropriate notice, and other such relief as is necessary to rectify the effects of the violations. In a response to the General Counsel's Motion dated January 29, 1981, the Respondent requested that proceedings on the Motion for Summary Judgment and the hearing scheduled for March 9, 1981, be stayed for a period of sixty days to allow the Respondent, which is engaged in bankruptcy proceedings before the United States Bankruptcy Court for the District of New Jersey, time to make application to the Bankruptcy Court for authorization to retain special Counsel to represent Respondent in this matter. In a letter dated February 3, 1981, the General Counsel opposed Respondent's request. He noted that Respondent has had more than six months to file an answer or to seek an extension of time in which to file an answer and to obtain Court authorization to employ labor counsel and has failed to do so. The General Counsel urges that Respondent's request be rejected and the Motion for Summary Judgment be granted.

The Board having duly considered the matter,

IT IS HEREBY ORDERED that the above-entitled proceeding be, and it hereby is, transferred to and continued before the Board in Washington, D.C., and that the hearing scheduled herein for March 9, 1981, be, and it hereby is, postponed indefinitely.

NOTICE IS HEREBY GIVEN that cause be shown, in writing, filed with the Board in Washington, D.C., on or before February 23, 1981 (with affidavit of service on the parties to this proceeding), why the General Counsel's Motion for Summary Judgment should not be granted.

Dated, Washington, D.C., February 9, 1981.

By Direction of the Board:

/s/ ENID W. WEBER

ENID W. WEBER
Associate Executive Secretary

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 22-CA-10061

BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION

AND

LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

RESPONSE OF BILDISCO AND BILDISCO DEBTOR-IN-POSSESSION TO NOTICE TO SHOW CAUSE

INTRODUCTION

Respondent, Bildisco and Bildisco, Debtor-in-Possession submit this response pursuant to the Notice issued by direction of the National Labor Relations Board on February 9, 1981 to show cause in writing why the General Counsel's Motion for Summary Judgment should not be granted.

RESPONDENT'S FAILURE TO ANSWER

The General Counsel's Motion is based on the failure of Respondent to file an Answer within the time permitted by the Board's Rules and Regulations. Respondent submit that its failure to file an Answer was due to the disruption in its operations caused by its reorganization proceedings under Chapter 11 of the United States Bankruptcy Code. Respondent has been and is currently attempting to retain and obtain Court approval to employ special labor counsel to handle the within matter, but has not to date obtained the requisite Order from the Bankruptcy Court. Meritorious defenses exist to the Complaint filed herein and Respondent contends that there will be no prejudice to the other parties by allowing Respondent additional time to file an Answer so that a full and complete hearing can be afforded to the parties.

RESPONDENT'S DEFENSE

In *Shopmen's Union No. 455* v. *Kevin Steel Prods.*, 519 F.2d 698 (2d Cir. 1975), the United States Court of Appeals held that upon the filing of a Petition under Chapter XI of the Bankruptcy Act a new entity, i.e. the Debtor-in-Possession, takes over the operation of the Debtor's business. As pointed out in the First Amended Complaint filed herein Respondent filed a voluntary Petition under Chapter 11 of the Bankruptcy Code of April 14, 1980 and has operated its business as a Debtor-in-Possession since that date.

On January 15, 1981 the Bankruptcy Court for the District of New Jersey entered an Order granting Respondent's Motion to reject its union contract dated May 1, 1979 with Teamsters Local No. 408. A copy of said Order is annexed hereto as Exhibit "A". Section 365(g) of the Bankruptcy Code, 11 U.S.C. Sec. 365(a) provides that rejection for executory contract relates back to immediately before the filing of the Chapter 11 Petition. It is clear, therefore, based upon the Order of the Bankruptcy Court that from and after April 14, 1980 no union contract existed between Respondent and the Teamsters Union. Accordingly all allegations contained in the Firt Amended Complaint relating to post April 14, 1980 activities are controverted as a matter of law. Similarly the remedies sought by the General Counsel to the extent they include a cease and desist Order, payment of pension, health and welfare contributions, vacation benefits and wage increases for the period subsequent to April 14, 1980 and the posting of appropriate notice are unwarranted since no collective bargaining agreement is currently in effect or has been in effect since April 14, 1980.

With respect to the period from January 3, 1980, the date of the first alleged violation, to April 14, 1980, Respondent contends that to any extent Respondent was in arrears in making pension, health and welfare contributions, such conduct did not constitute a unilateral change in existing terms and conditions of employment within the meaning of the National Labor Relations Act and the Board's Regulations. Any upaid contributions constitute nothing more than

claims in Respondent's Chapter 11 proceeding which sould be filed with the Bankruptcy Court, as required by the Bankruptcy Code, and will be subject to allowance in the Chapter 11 proceedings.

Respondent denies that it failed to remit union dues as alleged in Paragraph 16 of the First Amended Compalint inasmuch as the union requested Respondent not to withhold dues beginning at or near the date set forth in the First Amended Complaint as the commencement of the alleged failure to remit.

Respondent similarly denies the allegations set forth in Paragraph 17 of the First Amended Complaint that it failed and refused to pay vacaction benefits since on or about January 3, 1980.

CONCLUSION

For the reasons set forth above it is respectfully submitted that the Motion for Summary Judgement filed herein be denied. *It is further respectfullly requested that Respondent be afforded a reasonable period of time to obtain special counsel* and to fully respond to the allegations contained in the First Amended Complaint. Base on the substantial factual and legal issues present in the instant case, it is submitted that this matter should only be resolved after a full hearing.

RAVIN, KATCHEN & GREENBERG, P.A.
Attorneys for Respondent Bildisco and Bildisco,
Debtor in Possession

By: _____
JACK M. ZACKIN

CERTIFICATION OF SERVICE

This is to certify that the Response of Bildisco and Bildisco, Debtor-in-Possession to Notice to Show Cause have been served on the following parties by certified mail this 20th day of February, 1981.

Albert G. Kross, Esq.
Zazzali and Zazzali
Gateway I
Newark, New Jersey 07102

Marguerite R. Greenfield
Counsel for the General Counsel
National Labor Relations Board
Twenty-second Region
970 Broad Street
Newark, New Jersey 07102

Local 408 a/w International
Brotherhood of Teamsters, Chauffeurs,
Warehousemen and Helpers of America
1907 Morris Avenue
Union, New Jersey 07083

JACK M. ZACKIN

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY
No. 80-07288

In the Matter of:

BILDISCO, A General Partnership
in the State of New Jersey, Debtor.

In Proceedings for a Reorganizaton under Chapter 11 of the Bankruptcy Code

ORDER

This matter being opened to the Court by Ravin Katchen & Greenburg, P.A. on the return date of Notice to Reject Executory Union Contract with Teamsters Union Local No. 408, in the presence of Zazzali, Zazzali & Kroll, Esqs, the Court having considered the testimony and evidence presented, and having considered the arguments of counsel in opposition to the Motion of the Debtor, and due cause appearing;

IT IS on this 15th day of January 1981;

ORDERED:

1. That the Motion of the Debtor in Possession to reject Executory Union Contract dated May 1, 1979 with Teamsters Union Local No. 408, be and hereby is granted.

2. That said Teamsters Union Local No. 408 shall be allowed thirty (30) days from the date of entry of the within Order to file its claim for damages, if any, resulting from such rejection.

/s/ AMEL STARK
Bankruptcy Judge

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 22-CA-10061

BILDISCO AND BILDISCO, DEBTOR IN POSSESSION

AND

LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

GENERAL COUNSEL'S RESPONSE TO RESPONDENT'S RESPONSE TO NOTICE TO SHOW CAUSE

Counsel for General Counsel urges the Board to reject Respondent's defense for its failure to file an answer to the Complaint in the within proceeding. The Complaint alleges, *inter alia*, that Respondent unilaterally changed terms and conditions of employment in violation of Section 8(a)(1) and (5) of the Act. Respondent's Response requests time to obtain labor counsel and urges that the allegations are controverted by a recent order of the Bankruptcy Court rejecting the collective bargaining agreement between Respondent and the Charging Union.

By letter dated February 1, 1981 Counsel for the General Counsel urged the Board to reject Respondent's January 29, 1981 request for an adjornment to obtain labor counsel, on the grounds that Respondent's counsel had had more than six months to file an answer or to seek and to obtain labor counsel and had failed to do so. Accordingly, Counsel for General Counsel submits that Respondent's failure to answer the Complaint constitutes default and that its defense should be rejected as untimely, no good cause having been shown. See *APD Transport Corp.* and its *alter ego National Book Consolidators, Inc.*, 253 NLRB No. 56 (1980).

Dated at Newark, New Jersey on this 25th day of February, 1981.

Respectfully submitted,

/S/ MARGUERITE R. GREENFIELD
MARGUERITE R. GREENFIELD
Counsel for the General Counsel
National Labor Relations Board
Twenty-second Region
970 Broad Street
Newark, New Jersey 07102

This is to certify that the General Counsel's Response to Respondent's Response to Notice to Show Cause have been served on the following parties:

CERTIFIED MAIL

Albert G. Kroll, Esq.
Zazzali, Zazzali & Whipple
Gateway One
Newark, New Jersey 07102

Bildisco and Bildisco
Debtor-In-Possession
Craigwood Road
Avenel, New Jersey

Bildisco and Bildisco
Debtor-In-Possession
P.O. Box B
Rahway, New Jersey 07065

Richard Honig, Esq.
Ravin, Katchen & Greenberg
744 Broad Street
Newark, New Jersey 07102

Local 048 a/w International
Brotherhood of Teamsters, Chauffeurs,
Warehousemen and Helpers of America
1907 Morris Avenue
Union, New Jersey 07083

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 22-CA-10061

BILDISCO, AND BILDISCO, DEBTOR-IN-POSSESSION

AND

LOCAL 404, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

NOTICE OF MOTION FOR RECONSIDERATION

TO: ROBERT VOLGER
Executive Secretary
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

PLEASE TAKE NOTICE, that Bildisco and Bildisco, Debtor-In-Possession ("Respondent"), applies to the National Labor Relations Board to reconsider and vacate its Decision and order in the within matter dated April 23, 1981. Respondent will rely upon the enclosed memorandum and exhibits attached thereto.

ROTHBARD, HARRIS & OXFELD
Attorneys for Bildisco and Bildisco, Debtor-in-Possession

BY: ARNOLD S. COHEN
ARNOLD S. COHEN
For the Firm

Dated: MAY 20, 1981

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 22-CA-10061

BILDISCO, AND BILDISCO, DEBTOR-IN-POSSESSION

AND

LOCAL 404, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA.

MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER DECISION AND ORDER

STATEMENT OF THE CASE

This Memorandum is submitted by Special Labor Counsel for Bildisco and Bildisco, Debtor-in-Possession ("Respondent"), in support of Motion to Reconsider Decision and Order rendered April 23, 1981, by the National labor Relations board ("Board"), in the within matter. Special labor Counsel was designated by the United States Bankruptcy Court for the District of New Jersey by Order entered April 16, 1981 (Exhibit "A").

On February 2, 1981, counsel for the Board's General Counsel (Regional Director for Region 22), filed a Motion for Summary Judgment with the Board based upon Respondent's alleged failure to file an Answer according to the provisions of Sections 102.20 and 102.22 of the Board's Rules and Regulations, Series 8, as amended. By Order and Decision dated April 23, 1981, the Board granted the Motion for Summary Judgment. Respondent hereby requests that the Board reconsider its Order and Decision.

The Regional Director for Region 22 issued a complaint and notice of hearing on July 31, 1980 and a First Amended Complaint and notice of hearing on October 8, 1980, against Respondent, alleging that Respondent had engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Na-

tional Labor Relations Act, as amended. Specifically, the complaint alleged that Respondent failed to make pension, health and welfare contributions; remit union dues; and pay vacation benefits to certain of its employees, members of Local 408, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Union").

The Respondent has not answered the complaint, because until April 16, 1981, it was not represented by Special Labor Counsel. Specifically, on January 29, 1980, counsel for Respondent in its proceedings for reorganization requested that the Motion and the scheduled hearing be adjourned for sixty (60) days so that an appropriate application could be made to the Bankruptcy Court for authorization to retain Special Counsel (Exhibit "B"). On February 2, 1981, the Regional Director for Region 22 indefinitely postponed the hearing (Exhibit "C"). On February 20, 1981, an application was made to appoint Special Counsel (Exhibit "D"). Thus, Respondent hereby submits that factually, equity compels that good cause has been established and that the Order Granting Summary Judgment be reconsidered and vacated, with Respondent given an opprtunity to file an answer.*

ARGUMENT

Section 102.20 of the Board's Rules and Regulations, Series 8, as amended, provides as follows:

> "The respondent shall, within 10 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true

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* Respondent filed an answer with Region 22 with a copy of the within memorandum.

and shall be so found by the Board, *unless good cause to the contrary is shown.*" (Emphasis supplied).

Accordingly, the allegations contained in the First Amended Complaint herein will not be deemed to be admitted as true if respondent can establish good cause for failing to file a timely answer.

The facts herein compel the conclusion that good cause has been established. At the time the Motion for Summary Judgment was filed, counsel for Respondent in its reorganization proceeding requested that the motion, and the scheduled hearing be adjourned for sixty (60) days so that an appropriate application could be made to the Bankruptcy Court for authorization to retain Special Labor Counsel. On February 2, 1981, the hearing was indefinitely adjourned. The aforementioned application for special counsel was made on February 20, 1981. It was granted on April 16, 1981. Thus, counsel for the Respondent put the Board on notice of the difficulties encountered by the Respondent, and requested that this matter be ajdourned until Respondent could be appropriately represented. Still the Board entered summary judgment, shortly after special counsel was appointed, althrough Respondent requested an adjournment. It is respectfully submitted that Respondent, in essence, is being penalized for failing to file an answer prior to the time in which he was represented by Special Labor Counsel. As Respondent did not have access to an attorney with expertise in labor law until April 16, 1981, it could not properly answer the complaint prior thereto, and should not be penalized for failing to file an answer, or request an extension of time to file. The obligation of the Respondent was to obtain labor counsel. That it has done. Consequently, it should not be penalized for events which occurred prior to retaining such counsel.

Furthermore, it must be stressed that the argument of the Union is without merit; and assuming *arguendo* that it is meritorious, the Respondent would be barred from complying therewith under the provisions of the Bankruptcy Act.

In *Shopmen's Union No. 455* v. *Kevin Steel Prods.*, 519 F.2d 698 (2d Cir. 1975), the United States Court of Appeals

for Second Circuit held that upon the filing of a Petition under Chapter XI of the Bankruptcy Act, a new entity, *i.e.*, the Debtor-in-Possession, takes over the operation of the Debtor's business. As noted in the First Amended Complaint filed herein, Respondent filed a voluntary Petition under Chapter XI of the Bankruptcy Code on April 14, 1980 and has operated its business as a Debtor-in-Possession since that date.

Thereafter, on January 15, 1981, the Bankruptcy Court for the District of New Jersey entered an Order granting Respondent's Motion to reject its union contract dated May 1, 1979 with Teamsters Local No. 408. An Order affirming same was filed by Judge Anne E. Thompson, U.S.D.J. on May 6, 1981 (Exhibit "E"). Section 365(g) of the Bankruptcy Code, 11 U.S.C. Sec. 365(a), provides that rejection of an executory contract relates back to immediately before the filing of the Chapter XI Petition. It is clear, therefore, based upon the Order of Judge Thompson, that from and after April 14, 1980, no contract existed between Respondent and the Union. Accordingly, all allegations contained in the First Amended Complaint relating to post April 14, 1980 activities are controverted as a matter of law. Similarly, the remedies sought by the General Counsel to the extent they include a cease and desist Order, payment of pension, health and welfare contributions, vacation benefits and wage increases for the period subsequent to April 14, 1980 and the posting of appropriate notice are unwarranted since no collective bargaining agreement is currently in effect or has been in effect since April 14, 1980.

With respect to the period from January 3, 1980, the date of the first alleged violation, to April 14, 1980, Respondent contends that to any extent Respondent was in arrears in making pension, health and welfare contributions and wage increases, such conduct did not constitute a unilateral change in existing terms and conditions of employment within the meaning of the National Labor Relations Act and the Board's Regulations. Any unpaid contributions constitute nothing more than claims in Respondent's Chapter XI proceeding which should be filed with the Bankruptcy

Court, as required by the Bankruptcy Code, and will be subject to allowance in the Chapter XI proceedings.

Respondent denies that it failed to remit union dues as alleged in Paragraph 16 of the First Amended Complaint inasmuch as the union requested Respondent not to withhold dues beginning at or near the date set forth in the First Amended Complaint as the commencement of the alleged failure to remit. Respondent similarly denies the allegations set forth in Paragraph 17 of the First Amended Complaint that it failed and refused vacation benefits since on or about January 3, 1980. Furthermore, all claims for vacation benefits must be filed with the Bankruptcy Court under the provisions of the Bankruptcy Code.

CONCLUSION

For all of the reasons set forth above, it is respectfully submitted that the Decision and Order of the Board dated April 23, 1981, granting Summary Judgment in favor of the Union be reconsidered and vacated, and the Respondent be permitted to file an answer to the First Amended Complaint. Further, based upon the substantial factual and legal issues present in the matter, it is submitted that these issues can only be resolved after a plenary hearing.

Respectfully submitted,

ROTHBARD, HARRIS, OXFELD
Special Counsel for Bildisco and Bildisco, Debtor-in-Possession

By: ARNOLD S. COHEN
ARNOLD S. COHEN
For the Firm

Dated: MAY 20, 1981

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 22-CA-10061

BILDISCO, AND BILDISCO, DEBTOR-IN-POSSESSION,

AND

LOCAL 404, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

ANSWER

BILDISCO and BILDISCO, Debtor-In-Possession, by way of Answer to the First Amended Complaint, says:

1. It is without information or knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraphs 1(a). It admits the allegations contained in Paragraphs 1(b), (c) (d) and (e).

2. It denies the allegations contained in Paragraph 2.

3. It denies the allegations contained in Paragraph 3.

4. It denies the allegations contained in Paragraph 4.

5. It denies the allegations contained in Paragraph 5.

6. It admits the allegations contained in Paragraph 6(a). It denies the allegations contained in Paragraph 6(b).

7. It denies the allegations contained in Paragraph 7.

8. It is without information or knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraph 8.

9. It admits the allegations contained in Paragraph 9.

10. It admits the allegations contained in Paragraph 10.

11. It admits the allegations contained in Paragraph 11.

12. It admits the allegations contained in Paragraph 12.

13. It denies the allegations contained in Paragraph 13.

14. It admits the allegations contained in Paragraph 14, except that from and after April 14, 1980, no collective bargaining agreement has existed between Respondent and the Union.

15. It denies the allegations contained in Paragraph 15.

16. It denies the allegations contained in Paragraph 16.
17. It denies the allegations contained in Paragraph 17.
18. It denies the allegations contained in Paragraph 18.
19. It denies the allegations contained in Paragraph 19.
20. It denies the allegations contained in Paragraph 20.

FIRST AFFIRMATIVE DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Effective April 14, 1980, no collective bargaining agreement existed between the Union and Respondent.

THIRD AFFIRMATIVE DEFENSE

All claims made that Respondent is in arrears in making pension, health and welfare contributions, and in paying vacation benefits since on or about January 3, 1980, until on or about April 13, 1980, must be filed with the Bankruptcy Court, as required by the Bankruptcy Code.

WHEREFORE, Respondent demands judgment dismissing the Complaint with prejudice, together with costs.

ROTHBARD, HARRIS & OXFELD
Attorneys for Bildisco and Bildisco, Debtor-in-Possession

By: ARNOLD S. COHEN
For the Firm

Dated: MAY 20, 1981

CERTIFICATION OF SERVICE

This is to certify that the Answer of Bildisco and Bildisco, Debtor-in-Possession has been served on the following parties by Certified Mail, return receipt requested on May 20, 1981:

Albert G. Kroll, Esq.
Zazzali and Zazzali
Gateway 1
Newark, New Jersey 07102

Local 408 a/w International
Brotherhood of Teamsters, Chauffeurs,
Warehousemen and Helpers of America
1907 Morris Avenue
Union, New Jersey

/s/ ARNOLD S. COHEN
ARNOLD S. COHEN

Dated: MAY 20, 1981

CERTIFICATION

This is to certify that the Notice of Motion, the within Brief and answer of Bildisco and Bildisco, Debtor-in-Possession have been served on the following parties by Certified Mail, r.r.r. on May____, 1981:

Albert C. Kroll, Esq.
Zazzali and Zazzali
Gateway 1
Newark, New Jersey 07102

Marguerite R. Greenfield
Counsel for the General Counsel
National Labor Relations Board
Twenty-Second Region
970 Broad Street
Newark, New Jersey07102

Local 408 a/w International
Brotherhood of Teamsters, Chauffeurs,
Warehousemen and Helpers of America
1907 Morris Avenue
Union, New Jersey 07083

/s/ ARNOLD S. COHEN
ARNOLD S. COHEN

Dated: MAY 20, 1981

May 28, 1981

Re: Bildisco
Case No. 22-CA-10061

Arnold S. Cohen, Esq.
Rotherbard, Harris & Oxfeld
National Newark Building
744 Broad Street
Newark, New Jersey 07102

Dear Mr. Cohen:

This will acknowledge receipt of your Notice of Motion for Reconsideration and Memorandum in Support of Motion for Reconsideration of the Board's Decision and Order in behalf of the Respondent in the above case.

Consistent with the provisions of Section 102.48(d)(2) of the Board's Rules and Regulations, the last date for filing a motion for reconsideration in this case, was May 18, 1981. As your document was postmarked on May 20, and received in this office on May 22, it was untimely submitted and will not be forwarded to the Board for consideration.

For the above reason, I am returning all copies of your document herewith, with the exception of one copy which will be retained for the Board's informal case file.

Sincerely,

JOSEPH E. MOORE
Associate Executive Secretary

cc: Albert G. Kroll, Esq.
NLRB-Region 22

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

80-07283

In the Matter of:

BILDISCO, A GENERAL PARTNERSHIP OF THE STATE OF NEW JERSEY, DEBTOR

IN PROCEEDINGS FOR A REORGANIZATION UNDER CHAPTER 11 OF THE BANKRUPTCY CODE

VOLUNTARY PETITION UNDER CHAPTER 11 OF THE BANKRUPTCY CODE FOR PARTNERSHIP DEBTOR

The Petition of the above named Debtor respectfully shows:

1. Petitioner's post office address is P.O. Box "B", Rahway, New Jersey 07065.

2. Petitioner, Bildisco, A general Partnership of the State of New Jersey, with its principal place of business at 7 Cragwood Road, Avenel, New Jersey 07001, where it is engaged in the business of distributing, at wholesale, building materials and supplies and fabricating same to customers' specification.

3. Petitioner has had its principal place of business within this district for a longer portion of the 180 days immediately preceding the filing of this Petition than in any other district.

4. Petitioner intends to propose a Plan of Reorganization pursuant to § *1121*.

5. A list of Debtor's creditors and their addresses accompanies this Petition as Schedule "A".

6. An estimated statement of assets and liabilities is annexed to this Petition as Schedule "B".

7. Petitioner is qualified to file this Petition and is entitled to relief under Chapter 11 of Title 11 of the United States Code as a Voluntary Debtor.

WHEREFORE, Petitioner prays for relief under Chapter 11 of Title 11 of the United States Code.

BILDISCO, A GENERAL PARTNERSHIP
OF THE STATE OF N.J.

By: SALVATORE VALENTE

SALVATORE VALENTE
A General Partner

By: ARTHUR GERSHON

ARTHUR GERSHON,
A General Partner

RAVIN, KATCHEN & GREENBERG, P.A.

By: WILLIAM S. KATCHEN

WILLIAM S. KATCHEN

STATE OF NEW JERSEY)
) SS;
COUNTY OF ESSEX)

I, SALVATORE VALENTE, being duly sworn according to law, upon his oath, deposes and says:

I am a member of BILDISCO, A General Partnership of New Jersey, Debtor herein, and I am duly authorized to execute and within Petition on its behalf. The facts contained therein are true to the best of my knowledge, information and belief.

/s/ SALVATORE VALENTE
SALVATORE VALENTE

Sworn and Subscribed to before me this 14th day of April, 1980.

/s/ Grace Doll
GRACE DOLL
A Notary Public of N.J.

TOP 10 CREDITORS

Acme Steel Door, 513 Porter Avenue, Brooklyn, NY 11222 212-384-7800	$159,821.22
Five Star Aluminum, 349 McClean Blvd. & 20th St., Paterson, NJ 07503 279-3553	72,097.10
Dynamic Tool Corp., 141 Lansa Ave., Garfield, NJ 07026 340-3000	60,068.00
Royal Apex, P.O. Box 789, Plainfield, NJ 07061 753-6414	63,952.83
Metal Industries, Box M, Elizabethville, PA 17023 717-362-8196	63,205.92
Revere, Eastern Div., Gilpin Ave., Hauppauge, NY 11105 516-234-7500	57,925.38
Featherlite Mfg. Co., 1210 E. Maple Rd., Troy, Michigan 48084 313-585-8500	55,000.00
Alum Trim, Inc., 918 Stanley Ave., Brooklyn, NY 1120[illegible]8 212-649-1200	51,538.26
Pioneer Industries, 401 Washington Ave., Clarkstadt, NJ 07072 933-1900	37,194.51
Royal Aluminum, 620 Market St., Newark, NJ 07105 589-8880	30,451.50

SCHEDULE "A"

Acme Steel Door, 513 Porter Aven., Brooklyn, NY 11222
Acorn Bldg. Components, 12620 Westwood, Detroit, Mich. 46223
Air-Chek Mfg. Co., Inc., 876 Van Houten Ave., Clifton, NJ 07013
Air Vent, Inc., 6907 N. Knoxville Ave., Peoria, IL 61614
Aluma Trim, Inc. 918 Stanley Ave., Brooklyn, NY 11208
Americal Alum. Window Co., 767 Eastern Ave., Malden, Mass. 02148
V. E. Anderson Mfg. Co., P.O. Box 1250, Owensboro, KY 42301
Appleton Supply Co., 1050 So. Grider St., Appleton, WI 54912
Architectural Hardware, 169-171 York St., Jersey City, NJ 07302
Archbold Ladder Co., P.O. Box 337, Archbold, OH 43502
BQP Ind., Inc. 4747 Irontin St., Denver, CO 80239
Bayonne Steel, Bay Steel Circle, Totowa, NJ 07512
Bilco, P.O. Box 1203, New Haven, CT 06506
The Bogert & Carlough Co., 508-530 Straight St., Paterson, NJ 07509
Builders Mfg., 406 Thornton Ave., Leeds, Ala. 35049
Jack Buvitt, Inc., 60 E. 42nd St., NY, NY 10017
Century Shower Door, 33 Beckwith Ave., Paterson, NJ 07503
John J. Condon Co., 90-09 Liberty Ave., Ozone Pk., NY 11417
Cool Attic Corp., P.O. Box 11558, Fort Worth, TX 76109
Dorwin Mfg., 235 Midland Ave., Saddlebrook, NJ 07662
Dunbar Supply, P.O. Box 7, Dunbar, W. VA 20564
Durawood Corp., % Steinwart Sales, Box 7423, Shawnee Mission, Kansas 66207
Dynamic Tool Corp., 141 Lansa Ave., Garfield, NJ 07026
Featherlite Mfg. Co., 1210 E. Maple Rd., Troy, Mich. 48084
Five Star Aluminum, 349 McClean Blvd. & 20th, Paterson, NJ 07503

General Bathroom Products, 2201 Touhy Ave., Elk Grove Vill, IL 60007
Gerber Industries, Inc., 1510 Fairview Ave., St. Louis, MO 63132
Green Hammer, P.O. Box 32, Dover, NJ 07801
Glass Guard, P.O. Box 817, Webster, Mass. 07570
Glass Laboratories, Inc., 863 65th St., Brooklyn, NY 11220
Harrison Aluminum, P.O. Box 32, Dover, NJ 07801
Industrial Metal Products Co, 300 Baldwin St., New Brunswick, NJ 08901
K.D. Jalousie, 1004 Elizabeth Ave., Elizabeth, NJ 07201
Jamb Patio Door Mfg. Co., Inc., 28 Iroquis Dr., Parlin, NJ 08859
K-Lux, 10091 Manchester Rd., St. Louis, MO 63122
Keller Ind., Box 298, Milford, VA 22514
Kingsford Ornamental Bldg., P.O. Box 7739, Pittsburgh, PA 15215
Lamb & Ritchie Co., 90 Broadway-Rt. 1, Saugus, MA 01906
Leigh Products Co., 1 Highland Ave., Bala Cynwood, PA 19004
Leslie Locke, Ohio St., Lodi, Ohio 44254
Magee-Fine Lumber Co., P.O. Box 110, Irvington, NJ 07091
Metal Engineering, 51 Curtis Ave., Providence, RI 02909
Metal Industries, Box M, Elizabethville, PA 17023
Miami Carey, 203 Garver Rd., Monroe, OH 45050
Mildoor Assemblers, 15 E. Moonachie Rd., Hackensack, NJ 07601
Miller Shepard, 1165 E. Grand St., Elizabeth, NJ 07201
Frank Millner, 102 N. Olden Ave., Trenton, NJ 08606
Modulume Industries, 500 Mutuchen Rd., So. Plainfield, N J 07080
C. E. Morgan, 601 Oregon St., Box 2446, Oshkosh, WI 54901
Nautilus Industries, 19 W. 44th St., NY, NY 10036
Newark Kalamein, 601 S. 13th St., Newark, NJ 07103
Nicholas Mfg., Inc., 49 W. Quackenhust Ave., Dumont, NJ 17628
Norandex, 7120 Krick Rd., Cleveland, OH 44146

Ottowa Door Lite, Inc., 131 Harrison Ave., Zealand, Mich. 49464
Paece, Inc., 1 Executive Dr., Toms River, NJ 08753
Parker Hardware, 27 Ludlow St., NY, NY 10002
Passaic Metal Products Co., Five Central Ave., Clifton, NJ 07015
Peace Company, 7100 Dixie Hwy., Fairfield, OH 45023
Permaseal Mfg. Corp., 288 Lincoln Blvd., Middlesex, NJ 08346
Phillips Mfg. Co., 4601 So. 76th St., Omaha, Nebraska 68127
Pioneer Industries, 401 Washington Ave., Carlstadt, NJ 07072
Plaskolite, Inc., 1770 Joyce Ave., Columbus, OH 43219
Quaker City, Ind., Inc., 301 Mayhill St, Saddlebrook, NJ 07662
Revere, Eastern Div., Gilpin Ave., Hauppauge, NY 11105
Reynolds Metals Co., Richmond, VA 23261
Rich Ladder Co., P.O. Box 120, Carrollton, KY 41008
Robco Distributors, 263 W. Merrick Rd., Valley Stream, NY 11580
Roper Glass Co., Jasper & Hazzard Sts, Philadelphia, Pa. 19125
Royal Aluminum, 620 Market St., Newark, NJ 07105
Royal Apex, P.O. Box 789, Plainfield, NJ 07061
Royal Glass & Millwork Corp., 300 Nordhoff Pl., Englewood, NJ 07631
Royal Oak, Box 1024, Marion, VA 24354
Rusco, R. D. 2 Box 124, Cochranton, Pa. 16314
Sconzo & Son, 724 Montauk Hwy., Bayport, NY 11705
Sealrite Paint, 119 N. 11th St., Brooklyn, NY 11311
Seasonall, 1853 Morris Ave., Union, NJ 07083
Sell-Even, Inc., P.O. Box 101, Reedsville, Wis. 54230
Silvatrim Corp., 140 South Ave., So. Plainfield, NJ 07080
Silverline Mfg., 10 Boright Ave., Kenilworth, NJ 07033
Sky Master, 413 Virginia Dr., Orlando, FL 32803
Sparrow, P.O. Box 32, Dover, NJ 07801
Toco, 5530 Wisconsin Ave., Washington, DC 20015
Thermwell Products, 150 E. 7th St., Paterson, NJ 07524
Tri State, 551 Main Ave., Wallington, NJ 07055

Versatile Dist., Inc., Arnot Pl. & Mercer St., Lodi, NJ 07644
Vulcan Metal Prod., Inc., Box 688, Birmingham, ALA 35210
Jim Walters, P.O. Box 335, Century, Fla. 32535
Ware Industries, 61 Avenue K, Newark, NJ 07105
Weslock Div., 13344 S.Main St., Los Angeles, CA 90061
Window Component & Mfg., 3443 N.W. 107th St., Miami, FL 33167
Woodgrain Moldings, Inc., P.O. Box 1222,Americus, GA 31709
Absolute Fire Protection Co., Inc., 2800 Hamilton Blvd., So. Plainfield, NJ 07080
A.D.P. P.O. Box G 1966, Newark, NJ 07101
Addressograph, P.O. Box 11008, Newark, NJ 07101
Advance Computer Supplies, P.O. Box 492, Princeton, NJ 08540
Amoco, P.O. Box 28261, Raleigh, NC 27611
Anthony's, 1537 Irving St., Rahway, NJ 07065
Blue Cross of NJ, P.O. Box 799, Newark, NJ 07101
Barcaly Brand, 2401 S. Clinton Ave., So. Plainfield, NJ 07080
Benister Co., 425 Main St., Orange, NJ 07050
Central Auto Parts, 35-37 Cooke Ave., Carteret, NJ 07008
C.C. Preventive Maintenance, 260 Columbus Ave., Roselle, NJ 07203
Chemagraphic Products, 301 Veterans Blvd., Rutherford, NJ 07070
Chets Service, 1335 Roosevelt Ave., Carteret, NJ 07008
City Service, P.O. Box 992, Tulsa, OK 74102
Cliff Hardware, 1553 Irving St., Rahway, NJ, 07065
Coffee Systems of NJ, 1400 Rahway Ave., Avenel, NJ 07001
Walter Cohen, 15 Valley St., S. Orange, NJ 07079
Day Timers, P.O. Box 2368, Allentown, PA 16001
Dimensional Bldg. Service, 12 Cornell Pl., Englishtown, NJ 07726
Delta Lighting, 4667 Somerton Rd., Trenose, PA 19047
Eaton Credit Corp., P.O. Box 6738 J., Cleveland, OH 44101

Electro Protective, 25 Eastmans Rd., Parsippanny, NJ 07054
Elizabethtown Gas, P.O. Box 1450, Elizabeth, NJ 07207
Eskay, 24 Hutton Ave., W. Orange, NJ 07052
Exxon, P.O. Box 4298, Houston, TX 77210
Equico Lessors, 1 Garrett Mt. Plaza, W. Paterson, NJ 07422
Equilease Corp., P.O. Box 6000, San Francisco, CA 94160
Florence Landscaping, P.O. Box 1128, Perth Amboy, NJ 08861
Fogel Stationery, 1153 W. Elizabeth Ave., Linden, NJ 07036
Fidelity Paper, 382-388 Bloomfield Ave., Bloomfield, NJ 07003
Flowers by Wesley, 1803 Lincoln Hwy & Rt. 27, Edison, NJ 08817
Garden State Cleaning, 463 Jaques Ave. , Rahway, NJ 07065
Garden State Time Recorder, 510 Sylvan Ave., Englewood Cliffs, NJ 07632
Falcon Supply, P.O. Box 349, Old Bridge, NJ 08657
Garden State Business Machine, 1090 Bristol Rd., Mountainside, NJ 07092
General Electrical Contractors, 1216 New Market Ave., So. Plainfield, NJ 07080
General Tire, 400 Rahway Ave., Elizabeth, NJ 07202
Joseph George, 1157 Maurice Ave., Clark, NJ 07066
Glassfer Motors, 541 E. Spring St., Elizabeth, NJ 07201
Grafi, Inc., 506 E. Palisade Ave., Englewood, NJ 07631
Granet & Granet, 1605 Vaux Hall Rd., Union, NJ 07083
Guardian Life Ins., 201 Park Ave. So., NY, NY 10003
Grayarc Co., 822 Third Ave., Brooklyn, NY 11232
Gulfoil, 433 Hackensack Ave., Hackensack, NJ 07601
IBM P.O. Box 2614 Grand Central Sta., NY, NY 10017
International, 525 Linden Ave. W., Linden, NJ 07036
Jersey Tab. 649 Rahway Ave., Union, NJ 07083
Jersey Wide, 2100 Elizabeth Ave., Rahway, NJ 07065
Jet Messenger, P.O. Box 99, Metuchen, NJ 08840
Knapp Shoes, 1 Knapp Center, Brockton, Mass. 02401
Microdata, 17481 Red Hill Ave., Irvine, CA 92714

Middlesex Water, 1 Woodbridge Center, Woodbridge, NJ 07095
Mid-Interstate, 843 St. George Ave., Roselle, NJ 07083
Thom Mc Cann, 67 Mill Brook St., Worchester, Mass. 01606
Miller Shepard Paper Co., 1165 E. Grand St., Elizabeth, NJ 07208
Midlantic National Bank, 100 Evergreen Pl., E. Orange, NJ 07018
Mobil, P.O. Box 600, Kansas City, MO 64141
Minicomputer Sale & Service. 4 Gary Rd., Union, NJ 07883
Northern Propane, 369 Main St., Woodbridge, NJ 07095
N.J. Mfgrs. Insurance, Sullivan Way, Trenton, NJ 08628
N.J. Belt, P.O. Box 25, Elizabeth, NJ 07215
N.J. Credit Association, 504 Washington Ave., Kenilworth, NJ 07033
N.J. Lumber & Building Dir. Assoc., P.O. Box 359, Springfield, N.J. 07081
N.D.M.D.A., 55 E. Monroe St., Chicago, IL 60603
National State Bank, P.O. Box 1405, Elizabeth, NJ 07207
N.J. Turnpike Authority, New Brunswick, NJ 08903
Norris Chevrolet, 210 South Ave., Westfield, NJ 07091
Pitney Bowes, Walter N. Wheeler Jr. Dr., Stamford, Conn. 06904
Public Service Elec. & Gas, P.O. Box 7777, Elizabeth, NJ 07216
Prudential, P.O. Box 1399, Newark, NJ 07101
Benjamin Purlmutter, 7 Warner Rd., Maplewood, NJ 07040
Rahway Lumber, P.O. Box 1111B, Rahway, NJ 07065
Russo Business Machine, 391 Park Ave., Scotch Plains, NJ 07076
Summit Leasing & Capital, Park 80 Plaza W., Saddle Brook, NJ 07602
Shaw Barton, Coshocton, OH 43812
Silvatoir, 140 South Ave., So. Plainfield, NJ 07080
Star Ledger Co., Star Ledger Plaza, Newark, NJ 07101
Standard Register, Dept. 142, P.O. Box 14506, Cincinnati, OH 45201
Suburban Business Machines, 1053 Stuyvesant Ave., Union, NJ 07083

State Wide, 51 Main St., Woodbridge, NJ 07095
Summit Stationers, 290 Fourteenth St., Norwood, NJ 07648
Spring Motors/Glassfer, 541 Spring St., Elizabeth, NJ 07201
St. Paul's Fire, Ins. N. A.C., 77 Brant Ave., P.O. Box 919, Clark, NJ 07066
Sunway Lites, P.O. Box 8999, Ft. Lauderdale, FL 33310
Till U Communications, 1275 Bloomfield Ave., Bldg. 3, Fairfield, NJ 7006
Trivoli Electric, 322 Rahway Ave., Edison, NJ 08817
Tildin Commercial Alliance, 2 Lambert St. Roslyn Hgts, NY 11577
Union Pension Fund Local 408, 1907 Morris Ave., Union, NJ 07083
Teamsters Local 408 Welfare Fund, 1907 Morris Ave., Union, NJ 07083
Teamsters Union Local 408, 907 Morris Ave., Union, NJ 07083
Vermatrix, 1472 Clinton Ave., Irvington, NJ 07111
West Chemical, P.O. Box 820, Newark, NJ 07101
Westfield Leasing, 773 Central Ave., Westfield, NJ 07090
Paul B. Williams Printing, 1010 Broad St., Newark, NJ 07102
Sani Kill Corp. of N.J. P.O. Box 78, Bell Rose, NY 11426
Bilkay Express Company, 830 Old Corlies Ave., Neptune, NJ 07759
Con Rail, P.O. Box 8068-109, Philadelphia, Pa. 19177
Emery Air Freight, P.O. Box 7, Scranton, Pa. 18501
Halls Motor Tansit, P.O. Box 999, Machanicsburg, Pa. 17055
Mason Dixon Lines, P.O. Box 777, Kingsport, TN 37662
Mc Lean Trucking Co., P.O. Box 213, Winston Salem, NC 27102
Jones Motor Company, Inc., P.O. Box 200 Spring City, Pa. 19475
Roadway Expres, 61 Edgeboro Rd., E. Brunswick, NJ 08816
Oneida Motor Freight, P.O. Box 235, Carlstadt, NJ 07072
Seigel Express, 81 Porete Ave., No. Arlington, NJ 07082

Bargel Truck Leasing Co., 2480 Secaucus Rd., No. Bergen, NJ 07047

Hemingway Transport, Inc., 438 Dartmouth St., New Bedford, Mass. 02742

Preston Trucking Co. 151 Eastern Blvd., Preston, MD 21655

Automotive Collision Specialist, 5401 Tonnele Ave., No. Bergen, N.J. 07049

W. W. Grainger, Inc., 55 Jackson Dr., Cranford, N.J. 07076

Metropolitan Staple Corp., 415 Hope ave., Roselle, N.J. 07203

York Bros. Industries, Ltd., 495 Merrier Rd., Rockville Center, N.Y. 11571

Forle Machinery Company, 2271 Route 22, Union, N.J. 07083

BILDISCO
A General Partnership
(Unaudited and Estimated at March 31, 1980)

ASSETS	
Current Assets:	
Cash	$ 1,500.00
Accounts Receivable	798,000.00
Inventory	540,000.00
Prepaid exenses and other current assets	86,800.00
Total Current Assets	1,426,300.00
Fixed Assets:	
Property and Equipment Net of Accumulated Depreciation	181,500.00
Total Fixed Assets	181,500.00
Other Assets:	3,000.00
Total Assets	1,610,800.00
LIABILITIES	
Current Liabilities:	
Current portion of Notes and Mortgages payable	1,200,900.00
Accounts payable	1,000,700.00
Accrued Expenses	205,500.00
Taxes Payable	26,300.00
Loans payable	25,000.00
Total Current Liabilities	2,458,400.00
Long-Term Debt:	
Notes and mortgage payable	29,000.00
Loans payable	45,000.00
Total Long-Term Debt	74,000.00
TOTAL LIABILITIES	2,532,400.00

NOTE (1) Debtor has in its various banks accounts sums aggregating $1,000.00

NOTE (2) All of Debtor's assets are encumbered by liens. Debtor has a book equity over and above liens of $408,400.00

Date Petition Filed

Case Number

Bankruptcy Judge

1. Petitioner's employers' identification number is: 22-1532271

2. If any of Petitioner's securities are registered under § 12 of the Securities and Exchange Act of 1934, SEC file number is not applicable.

3. The following financial data is the latest available information and refers to Petitioner's condition on March 31, 1980:

a. Total Assets	$1,610,800.00
b. Total Liabilities	$2,532,400.00
Secured debt, excluding that listed below	$1,200,900.00
Debt securities held by more than 100 holders	—0—
Secured	—0—
Unsecured	—0—
Other liabilities, excluding contingent or unliquidated liabilities	Included in total Liabilities.

4. Brief description of Petitioner's businesses: Distribution, at wholesale, of building materials and supplies and fabricating same to customers' specifications.

5. The name of any person who directly or indirectly owns, controls, or hold swith power to vote 50% or more of the voting securities of Petitioner is: None

6. The names of all corporations 25% or more of the outstanding voting securities of which are directly or indirectly owned, controlled, or held, with power to vote by Petitioner is not applicable.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

In the Matter of:

BILDISCO, A GENERAL PARTNERSHIP OF THE STATE OF NEW JERSEY, DEBTOR.

In Proceedings for a Reorganization Under Chapter 11 of the Bankruptcy Code

AFFIDAVIT PURSUANT TO RULE B 2 E (3)

STATE OF NEW JERSEY)
) SS:
COUNTY OF ESSEX)

WILLIAM S. KATCHEN, of full age, being duly sworn upon his oath, deposes and says:

1. I am a member of the firm of Ravin, Katchen & Greenburg, P.A., 744 Broad Street, Newark, New Jersey.

2. My firm has received the sum of $10,000.00 on account of fees and disbursements herein from the Debtor.

3. My firm has been retained by the Debtor for purposes of representing the Debtor in Possession in connection with the within proceedings under Chapter 11 of the Bankruptcy Code, and has agreed with the Debtor that no additional compensation will be paid, except as may be allowed by the Court for services rendered and to be rendered by our firm herein.

4. No agreement or understanding in any form or guise exists between deponent and any other person for a division of compensation for services rendered in or in connection with this proceeding, and that no such division of compensation prohibited by § 504 of the Bankruptcy Code will be made by deponent, except with members of your deponent's firm.

/s/ WILLIAM S. KATCHEN
WILLIAM S. KATCHEN

Sworn and Subscribed to before me this 14th day of April, 1980.

/s/ GRACE DOLL
GRACE DOLL

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

No. 80-07283

IN PROCEEDINGS FOR A REORGANIZATION UNDER CHAPTER 11 OF THE BANKRUPTCY CODE

In the Matter of:
BILDISCO, A GENERAL
PARTNERSHIP OF THE
STATE OF NEW JERSEY, DEBTOR.

NOTICE OF MOTION TO REJECT EXECUTORY UNION CONTRACT

TO: TEAMSTERS UNION LOCAL NO. 408
1907 Morris Avenue
Union, New Jersey 07083

SIRS:

NOTICE IS HEREBY GIVEN that the undersigned attorneys for Bildisco, Debtor-in-Possession, will move before the Honorable D. Joseph DeVito, Bankruptcy Judge, at the United States Court House and Post Office Building, Federal Square, Newark, New Jersey, on Tuesday, December 23, 1980, at 10 o'clock in the forenoon, or as soon thereafter as counsel may be heard, for entry of an Order rejecting the May 1, 1979 Labor Contract with Teamsters Union Local No. 408, on the grounds that said Labor Contract is an undue burden to the Debtor and Debtor-in-Possession.

PLEASE TAKE FURTHER NOTICE that at the aforesaid time and place the undersigned will apply for an Order fixing the time for filing a claim for damages, if any, resulting from the above rejection upon an Order of the Court granting such relief.

Ravin, Katchen & Greenberg, P.A.
Attorneys for Bildisco,
Debtor-in-Possession

By: /s/ _____
RICHARD B. HONIG

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY
DOCKET NO. 80-02783

IN THE MATTER OF BILDISCO, DEBTOR

TRANSCRIPT OF PROCEEDINGS on Motion for Order rejecting Labor Contract dated May 1, 1979 with Teamsters Union Local No. 408, held before Honorable Amel Stark, Bankruptcy Judge on January 5, 1981 in the Federal Courthouse, Courtroom No. 3, Trenton, New Jersey, at 10:00 o'clock a.m.

APPEARANCES:

RAVIN, KATCHEN & GREENBERG, ESQS.,
Attorneys for Debtor
BY: WILLIAM G. KATCHEN, ESQ.

ZAZZALI, ZAZZALI & KROLL, ESQS.
Attorneys for Local No. 408
Gateway 1
Newark, New Jersey
BY: ALBERT G. KROLL, ESQ.

CHARLES DARROW & ASSOCIATES
143 East State Street
Trenton, New Jersey
BY: BERNICE STIMMEL, CSR

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EXHIBITS

EXHIBIT NO.		FOR IDEN.	IN EVID.
D–1	Collective Bargaining Agreement	18	25

[3]

PROCEEDINGS

THE COURT: Give your appearances to the reporter, please.

MR. KATCHEN: William Katchen, Ravin, Katchen & Greenberg, attorneys for debtor.

MR. KROLL: Albert G. Kroll of Zazzali, Zazzali & Kroll, attorneys for Local 408 Teamsters Union.

MR. KATCHEN: If your Honor please, this is the return date of a motion by debtor in possession to reject the union contract pursuant to Section 365.

The principal of debtor is in court, and I would like him to testify. Mr. Valente, will you take the stand.

SAL VALENTE, called as a witness, having been first duly sworn, was examined and testified as follows:

THE COURT: State your name and address for the record.

THE WITNESS: Sal Valente, 33 Maple Drive, North Caldwell.

DIRECT EXAMINATION

BY MR. KATCHEN:

Q What is your position with the debtor, Bildisco?

[4] A Partner.

Q Are you also a debtor individually in these proceedings?

A Yes.

Q Are you familiar with the company's operation since the filing of the Chapter 11 proceedings in this court?

A Yes, sir.

Q Previous to that, that time, how long have you been a principal in the debtor?

A A two year period.

Q Has that experience been continuous?

A Yes.

Q What are your responsibilities with the debtor?

A Well, the running of the business, the actual running of the business itself.

Q Does that entail involvement with the laborers?

A Yes.

Q And employees?

A Yes.

Q In what way?

A Well, of course the staffing of the whole organization and overseeing of the staffing.

Q Are you familiar with the cost of operations, including payroll and labor costs?

[5] A Yes.

Q Have you made an analysis of the cost on an annual basis with continuing employees under the labor contract dated May 1, 1979 with the Teamsters Local 408?

A Yes.

Q On an annual basis what would the cost to the debtor be for the next 12 months if the union contract were not rejected?

A Projecting the use of approximately 10 union people—the union people represent 40, 45 percent of our labor rolls.

THE COURT: Ten union employees?

A (Continuing) Projecting ten for the coming year, and—an additional cost of $100,000 over non-union personnel.

Q What function do these union people have?

A Warehousing, shop operations, manufacturing and truck drivers.

Q In today's economy, in your labor market, are there sufficient numbers of non-union employees who could be made available?

MR. KROLL: Objection. There is no foundation laid as to how he has that knowledge.

THE COURT: I will sustain the objection, Mr. Kroll.

[6] Q Have you made inquiry into the labor market in your area as to whether or not there are non-union employees available to fill the role?

A Yes.

Q THE COURT: To do what; what role?

MR. KATCHEN: Warehousing, shop operations and driving trucks, your Honor.

Q What inquiries did you make?

A We have looked at the local market and without even looking we get an average of two to three applications off the street. We are in a very highly industrialized area in Avanel and people are always coming in for applications.

Q $100,000 a year annual extra cost by the union contract, keeping that in force, does that allow for any cost of living increases or other costs that would have to be occasioned any way if you had a union contract?

A Both the analyses I made was based on static situations as of this date. There would be greater increases with the union than non-union because they have built into their contract a cost of living factor where my non-union people don't have that.

Q Approximately what percentage of the inflation or cost of living index would add to your labor cost for the year 1981?

A We have a maximum—I have the contract right in the [7] back. I believe it is 3 points maximum cost of living but that is in addition to their basic contractual increases of May 1st; over and above everything else.

Q If the debtor operation were to continue without union labor, do you foresee any interference in your operation, any curtailment of business, any hardship if the union people were no longer employed?

A No, of course not.

Q It is your opinion the union people don't serve an essential purpose to the debtor's ongoing operation?

A No.

Q On an annual basis of a savings of $100,000* that you forecast, are you able to predict whether or not the debtor can operate profitably?

A That makes a considerable difference in our potential profit for 1981. It is a year of coming out of Chapter 11. We need every penny we can get. A $100,000 swing with out company projecting a potential profit of $100,000 is one hundred percent difference in potential.

Q I assume your answer to my question was that is a difference between a profit and loss?

MR. KROLL: Objection.

THE COURT: I will sustain the objection. If you want to testify, Mr. Katchen, I will [8] put you on the stand.

BY MR. KATCHEN:

Q Mr. Valente, how close is the debtor's reorganization plan to fruition?

A I understand, speaking to other attorneys in your office, we filled out a disclosure statement a week ago. The next step is presentation to your Honor.

Q Has the Creditors Committee approved the plan offered?

A Yes, they have. One of the things they would like expanded is this union situation. They are aware of the problem it has created for us in the past. They are very much concerned with the union situation.

Q Would you outline what the terms of the plan are?

A The creditors have agreed to a 25 percent or 25 cent plan for a four year period. Due to that they feel for the future success of our company the payment is based on the future success of our company and they feel the union is highly involved with that.

MR. KATCHEN: No other questions.

THE WITNESS: May I add—

MR. KATCHEN: No. That is all.

THE COURT: Cross-examination, Mr. Kroll.

[9]

CROSS-EXAMINATION BY MR. KROLL:

Q Sir, do you have any collective bargaining agreements with any other labor organizations?

A No, sir.

Q How many employees are employed in bargaining unit positions?

A Three people.

Q Has that number deviated since you filed the petition for reorganization?

A Since the reorganization date?

Q April 14, 1980.

A April 14th we had 18 people. I might be off one or two, and we have had—we originally cut back to five, now three.

Q When did you cut back to the five?

A From the five to the three?

Q Yes.

A In November.

Q Since November you have operated with three employees?

A Three union employees.

Q Your analysis is based on a projected number of ten people?

A Yes.

[10] Q It is a $100,000 savings?

A Yes. I believe that is approximate.

Q Based on actual number of employees, that being three, your savings would be $30,000 in the same ratio; is that correct?

A I think your answer to that would be specifically that, yes. We would not be able to exist with three people.

Q You have been existing since November.

A We are off season. We are projecting three million dollars in sales and I need people in general.

Q With respect to the $100,000 savings, based on ten employees being employed in the classifications covered by the collective bargaining agreement, what specific wage rate is now being paid those three individuals?

A The wage rate—I used as a base rate $301, based on a 40 hour week. It is $7.65 an hour at this point. On May 1st, it is $8.35.

Q That is pursuant to the terms set forth in the collective bargaining agreement?

A Yes.

Q Are you using the figure with respect to the increase supposed to become effective May 1st?

A The old figure.

Q As of May 1, 1979 rate?

[11] A Yes, sir.

Q With respect to the agreement you have with your employees, isn't it a fact the NLRB has issued a complaint against Bildisco and Bildisco, debtor in possession?

A The union issued a complaint to the NLRB.

MR. KATCHEN: The pendency of that complaint is irrelevant to the motion going forward. The complaint deals

with something in the past and whatever the status is is irrelevant.

THE COURT: I don't think it is material whether or not they have a right to terminate this contract.

MR. KROLL: Yes, your Honor.

Q Of the three employees employed now, of your company, what positions are they?

A Truckdriver, warehouseman, shop man.

Q The truck driver is paid at a straight wage rate of $7.52 an hour?

A You have the contract. I don't have it.

Q Is that approximately it?

A I have $301 a week, divided by 40 hours. I did this on Saturday. It was done very hurriedly.

THE COURT: Is the rate the same for all three men?

[12] THE WITNESS: Yes, sir.

BY MR. KROLL:

Q Exactly $100,000 savings that you anticipate in the year 1981, what wage rate is that based upon?

A It is based on $301 that I have used as my foundation. If someone had a calculator, they could do it.

Q The men are presently making $301 per week?

A That is without fringes. That is the pay itself.

Q How exactly do you intend on saving $100,000; you are going to pay the same wage rate; is that correct?

A Yes. I have made an analysis that indicates $100,000 savings if I were able to go in the market and have non-union employees versus union. $300.00 with fringes; the union is $500 with fringes. That is how I made the analysis.

Q We know they are making $300 in wages; what is the additional?

A It costs me a week in addition to $301, $34.00 in payroll taxes, $26 a week pension—I can submit this, your Honor.

THE COURT: Just give me the fringes.

THE WITNESS: The base pay is $301. Payroll taxes $34 a week—

THE COURT: That is for everybody.

THE WITNESS: I have that indicated both ways. [13] I will give you a comparison. I start out—union 301; non-union 256. Payroll taxes non-union 21—union 24.

THE COURT: You don't pay that.

THE WITNESS: That is our participation in the payroll tax. That includes FICA, our contribution to social security, general payroll taxes, 8 per cent of payroll.

Pension, non-union, no money involved; union is $26 a week; holidays, my non-union people get six; union people 13, costs me $15 a week; health and welfare, non-union $15 a week; union, $40 a week.

Vacations, my non-union people are at an average of three weeks, which is $15 a week; union people five weeks, average $29 a week; personal days, non-union get none; union people get six, which costs $7 a week.

Sick days, non-union people none; union people 7; another $8 a week. What we call in general terminology in the contract as coffee and wash up time, no cost to non-union and an additional $25 a week to union people.

Then the last cost I have for both workmens comp adds $3 to non-union; $18 to union. That is 316 versus 493, union versus non-union.

[14] BY MR. KROLL:

Q With respect to the wage rate you set forth $256 wage rate you can pay your non-union people. Isn't that the starting wage rate set forth in the collective bargaining agreement?

A Starting wage rate for who?

Q Any new employee.

A I have no such agreement with non-union. 256 is just payroll for a number of people average. It has nothing to do with the bargaining agreement at all.

Q The 256 number is your payroll. What employees are placed into this.

A Taking everybody into that except management people and myself and computer people and clerical; in that group.

Q You put secretaries into that figure?

A We don't have secretaries; clericals. We have no secretaries per se.

Q With respect to the wage rate—I am confused—maybe you can help me.

The average cost of everybody in your company was 256?

A Everybody non-union.

Q If you were to have the contract rejected, you would continue paying employees the $301 rate?

A You are asking a question I don't know the answer to.

[15] Q You have not made up your mind if you are going to pay these three people or you are dropping to a lesser or even more rate?

MR. KATCHEN: The issue isn't $300. It is $200 in fringes. He made that clear earlier. This is ignoring what the testimony was.

THE COURT: I would assume, Mr. Kroll, when he gives 256, he has employees that make less and more. He was averaging them out, which he has done with the union.

I gather the three union people get 301 a week. He pays his foreman more than 300 a week. He is talking about 493 against 391.

THE WITNESS: I used the $7.52 rate. As of May 1st, 1981 that changes.

THE COURT: To what?

MR. KATCHEN: $8.35.

BY MR. KROLL:

Q That is what you are paying; you haven't given the last wage increase?

A No.

Q It was my understanding there was the difference between 256 and 301.

A No, sir.

[16] Q I stand corrected.

One item you mentioned was coffee and wash up time and you estimated that to be 25 for the three union personnel?

A Per person per week.

Q You estimate no cost to your company with respect to your non-union personnel; I take that to mean your non-union personnel don't take coffee time or wash up time?

A In a manner to continue to work. We have a built in 15 minute break and a ten minute break in the afternoon

and ten minute wash up; that is forty minutes a day. It costs me more than $5 a day. I believe I used $5 in my average.

My non-union people have a cup of coffee and continue to work.

Q That has to do with the nature of the work; is that correct?

A Not necessarily.

Q The people we are talking about are truck drivers?

MR. KATCHEN: We are getting into an argument. The union people don't work; that is all there is to it.

MR. KROLL: An union person, if he drives on the road, if he tried to drink his coffee at [17] the same time—you are comparing apples and oranges with that $25 savings.

THE COURT: Are there any other truck drivers, non-union?

THE WITNESS: It is a closed shop.

THE COURT: On truck drivers?

THE WITNESS: Yes.

THE COURT: How about warehousemen?

THE WITNESS: Everybody is union that performs a material handling function itself, whether production, warehouse work or truck driver.

THE COURT: So, if a truck driver drives to work, he can't drive and drink coffee?

THE WITNESS: That makes sense. I understand. I would give into that.

BY MR. KROLL:

Q With respect to your pension plan, the non-union employees don't have pension plans; is that correct?

A Yes.

Q When you were paying into the pension plan, that was at the 50 cent per hour rate?

A 60 or 65 cents per hour rate.

Q Let's see if I can refresh your memory. [18] 65 cents became effective May 1, 1980?

A Yes.

Q You have never payed that, though?

A I am not sure. It was May 1, 1979. If you go through that contract, you will find 60 or 65 indicated in that con-

tract. I don't know what wage—and I don't have mine in front of me.

MR. KROLL: Perhaps I could have it marked for identification.

THE COURT: D-1 for identification. (Contract, Local 408 and Bildisco, was marked as Exhibit D-1 for identification, as of this date.)

BY MR. KROLL:

Q Identify this for me, please.

A Our union contract.

Q I call your attention to page 18 of the collective bargaining agreement effective May 1, 1979; what was the rate per hour?

A 50 cents per hour.

Q That was the rate you were paying?

A My figures for the rates were gotten from the bookkeeping records. She prepares monthly the cost per employee for both health and welfare and pension, and all I did was take it right off of that. I understand what you [19] are saying.

Q There has been no pension contributions made by your company for in excess of a year; that is why we went to the NLRB; is that correct?

A That is not the reason.

MR. KATCHEN: Objection. This was previously sustained.

MR. KROLL: I will withdraw that.

Q Your company has made no welfare or pension contribution since approximately when?

MR. KATCHEN: Same objection. We are not dealing with the history of this case.

THE COURT: I think it is immaterial, is it not?

Q The third item after pension that you discussed with respect to the saving, what item was that?

A Holidays.

Q Six dollars and for your union personnel 15?

A Union versus non-union has to be number of days basically.

Q Your welfare was 40 dollars compared to 15?

A Yes, health and welfare.

Q 40 dollars per week based on what?

A Again from my bookkeeping records, average 3.33 bi-monthly contribution.

[20] Q That would average out to $160 per month?

A No. It averages out—you have to use 4.33 number, not a 4 number. My bookkeeper had it a little different way.

Q The rate called for in the collective bargaining agreement was 135 per month?

A The last rate we paid was $135 per month.

Q Non-union rate, you estimated to be $15 a week?

A Yes, sir.

Q What kind of plan do the non-union personnel have?

A That includes Blue Shield, Blue Cross and Major Medical.

Q Local 408 Health and Welfare plan is set forth in the collective bargaining agreement?

A As far as I know, yes.

Q Vacation, you estimate a difference of $15 for non-union and $29 for union personnel?

A Yes.

Q How long have the three individuals you presently employ in union positions—how long have they been employed by the company?

A Our last 16 people are all employed over 17 years.

Q The three people you presently have on your payroll?

A I believe some of them are as high as 20 years.

Q How long has Local 408 represented employees at Bildisco?

A I don't know.

[21] Q They were there before you came?

A Yes.

Q Non-union personnel receive no sick pay?

A No.

Q If a salesman is out sick, he is not paid for that day?

A The way that will take place is if it is something extended he may take vacation, or it will happen in a different manner.

There is no formal sick days, period. People are paid and it is done by our own volition. They make it up in different ways.

Q Is a salesman on salary?

MR. KATCHEN: I object. It is not covered—

THE COURT: I will permit it. He is comparing apples and peaches, I think.

Q Is a salesman on a salary basis?

A Partial salary and mostly commission basis. If he is out, he will get hurt in other ways.

Q There is less chance for him out on the road attempting to make sales; that is how he gets hurt?

A He can't see customers. That is the name of the game.

Q Let's talk about other than secretaries and salesmen; who else do you have employed there?

[22] A We have what we call an order desk which receives telephone calls which is part of the sales department. We have bookkeeping functions and part of that is computer functions.

Q Those individuals are employed on a salary basis?

A Yes.

Q If one of those individuals misses a day, do you dock them for that?

A No. I say no, and hesitantly. It is a determination of the people who manage them. They make it up in different ways. Two people came in Saturday to close the records. It is done in different ways. It is not a rigid system.

We have a right to docke them if we wish. I don't believe it is always done and I believe it's what—it is somewhat used as a reward basis and we have a good relationship with our people.

Q With respect to the sick days, how many sick days do your three union people receive?

A Eight days a piece.

Q Per year?

A Per year.

Q Your analysis was done on the basis of 8 days?

A Yes, sir—excuse me—seven days. $8 but on 7 days.

Q The final figure is one based on workmens comp. [23] The difference between the non-union, $3.00 and the union, $18.00.

A That is not, honestly speaking, whether the warehouse functions or not. That is why I added on the bottom, so to speak.

Q That $18.00, it makes no difference if it is a union man or non-union man, you are still going to pay $18.00 in workmens comp?

A Right.

Q How many personal days are the three union employees permitted per year?

A Six. You find that in two different areas, personal days, per se, and what the union contract refers to as family death days or something to that extent.

Q You are combining both personal days and if somebody had a death in the family, they can take a day or two?

A Yes. Would you like the reason why?

THE COURT: Just answer the question.

Q In the past was one of your non-union personnel taken—did one take off for a death in the family?

A I imagine they have.

Q Have they been paid their regular salary?

A The same answer as sick days. It is done on a flexible basis. Where we feel, we should, we reward. There [24] is not a set answer to it.

Q If you can recall in the past two years that you have been with the company, do you know of an incident where a non-union employee was not given—took a day off and was not compensated?

A Was not compensated?

Q AI am talking about he was docked.

A Sure, many, many times. We employed as many as 55 people; hundreds of times. Not one or ten times.

Q Out of your overall labor costs, what is the percentage of the three union individuals?

MR. KATCHEN: Objection, your honor. The forecast of $100,000 was predicated on ten. A question of limiting this to 3—

MR. KROLL: I am talking of right now.

THE COURT: There is a difference of $132 a week right now, not in slary but in fringes—fringe benefits.

By simple mathematics if you want to know what it is for three people, it is $396.

MR. KROLL: Your Honor, with all due respect to the court, I don't believe it is the exact amount of the rate: he is not paying that rate. The Welfare and pension contributions, he has estimated the highest contribution.

[25] THE COURT: Under the contract this is what he should be paying and from what I have heard and I shouldn't have heard, this is what your suit is before the NLRB.

MR. KROLL: That complaint is already issued. It is not a charge. It has been issued against them.

THE COURT: Maybe somebody should move to restrain the suit.

MR. KATCHEN: Since we are off on a tangent, we are considering an application to retain special labor counsel.

MR. KROLL: That is all the questions we have, your Honor. We move that the collective bargaining agreement be placed in evidence.

THE COURT: Any objection?

MR. KATCHEN: No objection.

THE COURT: D-1 in evidence.

(Exhibit D-1 for identification was received in evidence, as of this date.)

MR. KATCHEN: Can you give me one second, please?

(A short recess was held at this time.)

THE COURT: All right.

Back on the record. Mr. Katchen?

[26]

REDIRECT EXAMINATION BY MR. KATCHEN:

Q Your company operates what is known as a closed shop?

A Yes.

Q If this union contract is not terminated, what is the effect as you understand the union contract, and its operation, to be for a closed shop if you wanted to employ someone not a union member?

A I couldn't do it as a warehouse or trucking function.

Q Unless you paid the union contract rates?

A Being somewhat ignorant, it is not only the rate, but they must be a member of the union.

MR. KATCHEN: No other questions.

RECROSS EXAMINATION BY MR. KROLL:

Q To clarify the record, you are talking about the union security clause in the contract?

A I am talking about 30 days they must be a member of the union.

Q They must pay dues and initiation fees to the union?

A And be a member of the union.

Q That is not a closed shop. You have a union security clause in your contract whereby it says after 30 days [27] they must pay.

A I don't know the definition. You have to be a union member.

THE COURT: You don'thave to be a union member to be employed?

THE WITNESS: NO.

THE COURT: But you must become a member of the union?

THE WITNESS: That is right.

MR. KROLL: No further questions.

MR. KATCHEN: That is all we have.

I believe—I submit that 365 indicates clearly without exception any executory contract for cause can be terminated, and the cause in the case is at the present time we forecast coming out of court in a reorganization plan to pay 25 percent over a period of four years, over an annual forecast of 12 months if the union; contract is not rejected, we anticipated having to pay at least $150 a week more per person than we would otherwise have to pay.

If the forecast is employing ten people a week, covered by those rates, we are talking about $1500 a week. The forecast was approximately $2000 a week because he forecast more extra cost based on May 1, 1981.

[28] On that basis I am talking about cost of $100,000 a year. Call it $50,000 a year or $100,000 a year; it is simply

that amount of money to be saved to assist this debtor, and that is what 365 requires, that it be a termination for cause.

It is not a case of equal benefits by retaining the contract versus rejecting the contract. The evidence is all one way.

There is no benefit to commensurate with rejection—excuse me—no benefit commensurate with refusing rejection.

We can get substitute people; we can employ them. As a matter of fact—I withdraw that.

I will conclude by saying that unlike the legal principles that were created by the courts before the adoption of the Bankruptcy Reform Act, there seems to me to be no special class of executory contract. It is a lease or executory contract. There is no new species for labor contracts. They are in the same class as any other.

If the benefit from rejection outweighs the deteriment, than the balance of equity should [29] allow the debtor the perogative to reject for cause shown, and I think this we have shown.

Thank you.

THE COURT: Mr. Kroll?

MR. KROLL: I would like to pick up on the tail end of counsel's statement that there are no special classifications of executory contracts.

In fact, there are court decisions involving labor contracts. I am talking about collective—

MR. KATCHEN: I am talking about—I said before 1979. After 1979 Congress made no distinction. I misspoke, but that is what I intended to say.

MR. KROLL: It is a very unique type of executory contract.

You have decisions in the Allanwood case and Penn Fruit Company, both out of the Eastern District of Pennsylvania.

I think the findings have been to set aside a collective bargaining agreement, the Court must determine that the collective bargaining agreement is so burdensome or [30] onerous, to make it impossible the successful rehabilitation of the debtor.

It is not enough that the debtor feels that the contract is a financial hardship to him.

In addition, your Honor, to make that determination, you must also weigh the equities between the debtor and the employees of the company. The decision to allow rejection should not be based solely on whether it will improve the financial status of the debtor.

There is a balance of equity in the two-step test. Here employees are employed in excess of twenty years. They have pension rights, seniority rights, and what the debtor in possession is asking the court to do is throw those rights out the window.

Again I repeat, the court must determine that the collective bargaining agreement is so burdensome as to make impossible the successful rehabilitation of the debtor, and there has been no evidence to indicate that, your Honor.

MR. KATCHEN: The cases Mr. Kroll cited—

[31] THE COURT: I know, Mr. Katchen, that he is citing cases prior to the Code, and I must agree with Mr. Kroll completely.

In the Allanwood case and the Food Fair case this is what the U.S. District Court for the Eastern District of Pennsylvania, as well as Judge Goldhaber in the Bankruptcy Court decided.

365-A of the Bankruptcy Code says that a trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor, and 365-D-2 in a case under Chapter 9, a trustee may reject or assume at any time before confirmation of the plan.

I don't know why Congress wrote 365(a) and (B) in such simplistic language. I would assume a good reason for rejecting the contract or the court approving rejection is the fact that debtor appearently feels he can do without the union contract and save, according to the testimony—undisputed testimony—assuming there are ten employees and assuming it is May 1, 1981 figures, it is approximately $100,000 a year.

[32] Now if that isn't a good reason for the debtor coming in and saying I want to reject the contract, I don't know what would be a good reason.

Now the union and the employees have a right to claim damages as a result of the rejection of the contract. They

can file a complaint for the purpose of having damages fixed, and I suppose they will have—there will have to be a trial on the damages to ascertain what the damages might be.

MR. KATCHEN: Subject to the maximum in 502. An employment contract has a one year cap on it.

I am sorry to interrupt, but all the history about the bankruptcy reform act that can be found, that I have been able to find, does not discuss the old cases, not only from this circuit but any circuit.

Apparently when Congress wrote 365 it did so without exception. That is my point.

You say simplistic terms; well it may be that Congress was very deliberate. They didn't want to make exceptions.

Each case is to be decided on its own [33] merits, no special class for union contracts. Each case was to be decided on its own.

The union has no higher dignity in this court and no court except the NLRB. It has no special status. It is like anyone else.

If they cost the debtor that much more, Congress is definite in saying that is an impact that the debtor should avoid; so the debtor should survive, and that is what this is all about.

THE COURT: As to the legislative history, the record should indicate that the court should permit termination, but should compensate, and of course it is up to, in this case, the union, to file a complaint.

I believe that the reason for the approval is not so much in the case of rejection, but in the case of acceptance of an executory contract, or an order to accept an executory contract, or assume an executory contract, the debtor must make the other contracted party whole.

I don't know under the Code what power the court has to disapprove an application to [34] reject a contract, unless it can be shown it was a promiscuous act on the part of the debtor, and it was really a beneficial contract.

It is surely not a beneficial contract if it costs him $132 a week, which is my own computation, more than he would have to pay if he didn't have the contract.

Under the circumstances I am going to have to allow the motion of the debtor.

How much time are you going to need to file a complaint for damages?

MR. KROLL: I have to review. We have requested an audit of the records to ascertain how many people were employed in the payroll. To date we have not heard anything.

As soon as we can get an audit done, as to what people were working and when, then I can file the complaint.

THE COURT: Sixty days?

MR. KROLL: As long as the employer is willing—we have to have an audit of the books.

THE COURT: How long do you need to audit the books?

[35] THE WITNESS: With reference to what?

THE COURT: How many people have been on the payroll.

THE WITNESS: This is news to me.

MR. KROLL: By December 5th a letter was forwarded to you.

THE WITNESS: I will check into it. It is an easy thing. I am sorry.

Your Honor, in this NLRB thing we never had representation. We needed permission of the court. Upon to this point we haven't sought this permission. We haven't been able to answer any of the things. I apologize.

MR. KROLL: I am talking about the letter that the union sent to you.

THE WITNESS: Mr. Malofsky said it had to do with the same thing.

MR. KATCHEN: I will answer in less than a week for counsel the present payroll roster showing hours employed since the Chapter 11 was filed for everyone in the union contract.

I will do it within a week.

THE COURT: 30 days?

MR. KROLL: That is sufficient.

Just for the record, your Honor, with [36] respect to the ruling today, it is your position, your Honor—and correct me if I am wrong—the case prior to the enactment of the Bankruptcy Code, those cases dealing with special consid-

erations given collective bargaining are no longer applicable?

MR. KATCHEN: I don't think you should ask the basis.

Your Honor said the testimony is undisputed. We show a one-way benefit. If counsel thinks there is error, he can pursue it. I don't think there is any provision to conduct discovery of the court.

THE COURT: All I am saying is this is not a case under the Bankruptcy Act; it is under the Bankruptcy Code.

Under Section 365 I have to grant the motion to reject.

MR. KROLL: Thank you, your Honor. I didn't mean any insult to the bench.

THE COURT: Motion of debtor to reject the May 1, 1979 labor contract of Teamsters Union Local 408 allowed and the union is allowed 30 days from the date of the order within which to file a claim for damages.

[37] MR. KATCHEN: I will submit an order, your Honor.

THE COURT: Thank you, gentlemen.

(The witness was excused at this time.)

* * *

I hereby certify that the within is a true and accurate transcript of the said proceedings.

/s/
BERNICE STIMMEL, CSR

BUILDING MATERIALS, HEAVY, HIGHWAY, AND CONSTRUCTION INDUSTRY DRIVERS, HELPERS, AND WAREHOUSEMEN

TEAMSTERS UNION LOCAL NO. 408
1907 Morris Avenue, Union, New Jersey 07083

AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFUERS, WAREHOUSEMEN, AND HELPERS OF AMERICA

THIS LABOR CONTRACT entered into between ARTHUR GERSHON & MRS. RUTH PERLMUTTER t/c BILDISCO, having its or his place of business at P.O. Box B, Rahway, New Jersey, and elsewhere, hereinafter referred to as the "Employer", and TEAMSTERS UNION LOCAL NO. 408, hereinafter referred to as the "Union", this 1st day of MAY 1979.

WHEREAS, the Union is the authorized and recognized exclusive collective bargaining agent for all employees of the Employer designated in Section 2-a below in respect to wages, rates of pay, hours of employment, and other conditions of employment.

WITNESSETH: that for the purpose of mutual understanding and in order that a harmonious relationship may exist between the Employer(s) and the employee(s) in the driver and warehouse industry, to the end that continuous and efficient service will be rendered to the mutual benefit of the parties hereto. Now, therefore, it is hereby agreed by and between the parties hereto as follows:

SECTION 1

(a) That this contract shall govern all wages, hours, and working conditions as set forth herein for the employees listed according to their job classification in Section 2–a.

(b) The Employer shall not enter into any other written or oral agreement with any employee or group of employees covered by this agreement which in any way violates

the wages, hours, or working conditions of this contract. In the event any such agreement is entered into with the consent of any employee or group of employees, the Union reserves the right to issue a work stoppage and order shall not be considered as a breach of this labor contract.

SECTION 2

(a) JOB CLASSIFICATIONS...

WAGES PER HOUR::eli	MONDAY TO FRIDAY...	EFFECTIVE	
Straight Truck Driver	$7.52	$7.98	$8.37
Warehousemen	7.52	7.97	8.37
Mechanics "A"	7.52	7.97	8.37
Outside Field Service Men	7.52	7.97	8.37
Order Pickers	7.00	7.45	7.85
Mechanics "B"	7.30	7.75	8.15
Working Foreman	7.82	8.27	8.67
Helper	6.46	6.91	7.31*

*HELPER ON PAYROLL MAY 1, 1979, SHALL, UPON COMPLETION OF SIX (6) MONTHS SERVICE RECEIVE AN INCREASE TO SAID RATE.

(b) CLASSIFICATION	Starting Rate	After Prob. Period	After 6 Months
Straight Truck Driver	$6.72	$7.09	$7.52
Warehousemen	6.72	7.09	7.52
Mechanic "A"	6.72	7.09	7.52
Mechanic "B"	6.72	7.09	7.52
Order Picker	6.20	6.57	7.00
Helper	5.66	6.03	6.46

The shop steward or acting shop steward shall receive the sum of fifteen cents (15¢) per hour in addition to his regular rate of pay. Overtime per hour shall be increased accordingly.

(d) Whenever a dispute arises about the wages of an employee, the business agent of the Union shall have the right to inspect the Employer's payroll or time card records of the employee.

(e) Except to the extent that specific provisions have been made in this agreement concerning working hours, rates of pay, and terms and conditions of employment, it is

hereby understood and agreed that if there are any existing conditions such as rest periods, wash-up time, and assignment or work that is more favorable than are called for in the contract, the same shall be continued as herefore.

(f) Employees covered by this agreement receiving more than the wages set forth, more advantageous hours, bonus, or working conditions shall suffer no reduction in pay or loss of any of the benefits derived from those hours, bonus, or working conditions by virtue of this contract.

SECTION 3

(a) Eight (8) consecutive hours, exclusive of the lunch hour, shall constitute a regular day's work for all employees covered by this contract, Monday to Friday, inclusive. All time worked by employees in excess of the eight (8) hours each day, Monday to Friday, inclusive, shall be paid for on the basis of time and one-half (1½) the rate per hour listed in Section 2–a, according to the employee's job classification.

(b) Employees assigned to work each day Monday to Friday, inclusive, shall be guaranteed a minimum of eight (8) hours work or shall be paid for same by the Employer.

(c) All Saturday work (if not a holiday) shall be paid for at the rate of time and one-half (1½). Employees assigned to work on Saturday (if not a holiday) shall be guaranteed a minimum of five (5) hours and twenty (20) minutes work at time and one-half (1½). or shall be paid for same by the Employer.

(d) Employees assigned to work on a Saturday that is a holiday shall be paid for all work at triple straight time and shall be guaranteed a minimum of five (5) hours and twenty (20) minutes work or shall be paid for same by the Employer.

(e) Employees who are assigned to start work any day Monday to Saturday (if that Saturday is not a holiday) inclusive, by the Employer or the Employer's representative(s), but are not placed to work, shall nonetheless be paid a day's pay. When employees are assigned to start work on a Sunday or any of the holidays named in this

agreement by the Employer, but are not placed to work, that employee shall be paid two (2) day's pay.

(f) STARTING TIME: a regular day's work for employees shall be from 7:00 a.m. to 8:00 a.m., starting time to be computed from the time of the employees starting to work at the Employer's place of business to leaving same. Time clocks shall be used to record employee's working time.

(g) Where employees are required to report for work before 7:00 a.m., they shall be paid for such period at the overtime rate. Where employees are required to report for work at 8:00 a.m., or any time thereafter until 4:00 p.m., the starting time shall be as of 8:00 a.m., and they shall be guaranteed a minimum of eight (8) hours work or shall be paid for same.

(h) NIGHT WORK: employees who are assigned to night work shall be paid seventeen and one-half cents (17½¢) per hour in addition to the wage per day, in accordance with Section 2-a. The overtime per hour shall be increased accordingly. The night shift shall start between 2:00 p.m. and 4:00 p.m.

(i) Any employee who will be absent from work for any reason shall call the Employer prior to the starting time of the day that he will be absent or the evening before. Disputes arising over this paragraph shall be referred to the Local Union, pending the decision of the Local Union.

SECTION 4
Lunch Period

(a) One (1) hour or one-half (½) hour shall be the full lunch time for all employees, which period shall start not before 11:30 a.m., nor later than 12:30 p.m.

(b) On night work, the dinner hour for all employees shall be taken and completed between the 4th and 5th hours after the employee has commenced work.

(c) Employees who are ordered to work during part of their full lunch time shall be paid for the full lunch time at the overtime rate applying to that day. Employees who are ordered to work through their full lunch time shall be granted fifteen (15) minutes to eat lunch and such time shall be credited as time worked.

(d) Employees who start work on a regular day's work after 12:00 Noon shall not receive any lunch period.

(e) All employees shall be granted fifteen (15) minutes coffee period in the morning hours of each day; and ten (10) minutes coffee period in the afternoon hours.

(f) Employees shall be granted five (5) minutes wash-up time before lunch,and also at the end of the shift, and shall be paid for same by the company.

(g) Any employee directed by the supervisor to work one (1) hour or more overtime, in any one day, shall be entitled to one-half (½) hour paid lunch period; any employee directed to work less than one (1) hour overtime after 6:00 p.m., shall be entitled to a fifteen (15) minute paid lunch period.

SECTION 5
Duties of Employees

(a) Drivers may be required to assist in loading and unloading other vehicles in addition to those they drive; to drive one or more trucks during their working day; to make pick-ups and deliveries; to make inside deliveries, except that they shall not be held responsible for losses occurring in making inside deliveries. He may also be required to perform warehouse work.

(b) The Employer shall be the sole judge in determining whether or not helpers should be assigned to trucks or to their equipment.

(c) Motorized lift truck operators shall operate lift trucks at the Employer's place of business. He may also be required to perform warehouse work.

(d) Warehousemen's duties shall consist of the handling and checking of all freight in the warehouse of the Employer, and the loading and unloading of freight cars, and the loading and unloading of freight on and off vehicles, and operate motorized lift trucks. Warehousemen must, in an emergency, drive trucks.

(e) The Employer agrees that the delivering and/or picking up directly connected with the trucking and shipping operation shall be performed only by the employees governed by this agreement.

(f) The Employer agrees that all handling, assembling, checking, loading, and unloading of the Employer's freight (part materials, etc.) finished products in, on, or about the Employer's place of business shall be performed by only those employees employed by the Employer who are governed by this agreement.

(g) Employees shall not be deprived of earning opportunity due to the Employee hiring or contracting for outside help.

(h) The Employer will respect the jurisdictional rules of the Union and shall not direct or require their employees or other persons other than the employer in the bargaining unit here involved to perform work which is recognized as the work of the employees in said unit.

(i) Supervisory personnel of the Employer shall be restricted from performing the work which is recognized as the work of the employees covered by this agreement.

(j) Employees shall not operate unsafe vehicles, i.e., vehicles on which the brakes, horn, steering apparatus, lights, directional signals, windshield wipers, etc., are not in proper working order as required by the State Motor Vehicle Laws and the I.C.C. Rules and Safety Regulations. Employees shall not be held responsible for vehicles not properly equipped to comply with the State Motor Vehicle Laws and I.C.C. Rules and Safety Regulations and shall be compensated for fines, traveling expense, and time lost if summoned to court etc., because of same.

(k) Drivers to use utmost care at all times to prevent loss of materials. Where loss of freight occurs through the negligence of the driver, he shall be held responsible for same where it is proven that said loss occurred through his negligence or carelessness. Disputes arising over this paragraph shall be referred to the Local Union, pending the decision of the Local Union.

SECTION 6
Seniority

(a) Seniority according to all job classifications shall prevail at all times.

(b) There shall be one seniority list consisting of the regular payroll record, subject to the approval of the Union.

(c) Employees shall be ranked in seniority, according to their length of service with the Employer in all classifications of work to which they are assigned.

(d) There shall be seniority lists for all classifications of work as follows:

1. STRAIGHT TRUCK DRIVERS, WAREHOUSEMEN, MECHANICS, OUTSIDE FIELD SERVICE MEN, and HELPERS who shall be on one seniority list and referred to as such.
2. WORKING FOREMEN who shall be on one seniority list and referred to as such.

(e) All work shall be allocated to employees in strict conformity with such seniority list and the employees with the most seniority shall be assigned to work at the first job allocated that day, and the next senior employee shall be assigned to the second job allocated that day, etc.

(f) Employees on the seniority list shall apear for work at the time designated by the Employer. Employees failing to appear at the time shall forfeit their place on the seniority list for that day and shall not be placed to work until all other employees who appeared at the time designated by the Employer have been placed to work in seniority order. Employeees who were booked to work, but appeared late, shall also be placed at the bottom of the list for that day.

(g) New employees shall be placed at the bottom of the existing seniority list after the completion of their first day's work.

(h) Any employee who is absent through sickness or injury shall receive his regular seniority upon returning to work, providing the Employer and the Union have been notified of said sickness or injury within seventy-two (72) hours after the employee has taken sick or is injured.

(i) The Employer shall grant employees a leave of absence without loss of seniority, upon the request of the Union only.

(j) Any employee entering military service in any branch of the United States Government shall resume seniority with the Employer when discharged from such service. He shall not suffer any loss of seniority.

(k) Employees on the seniority list who fail to report for work in person for three (3) consecutive working days shall forfeit their place on the seniority list and shall be placed behind the junior employee on the seniority list upon their return to work.

(l) Employees who are laid off from the employ of the Employer because of lack of work shall be listed in the employment records of the Employer for a period of one (1) year after being laid off, and in the event the services of those employees are required by the Employer during said one (1) year, the Employer shall notify such employee in seniority order, in writing by certified mail, addresssed to their last known address to return to work. The Employer must notify the Local Union also of the above. Employees so notified shall return to work within three (3) days from the date such notification was mailed.

(m) Seniority shall be broken only by:

1. VOLUNTARY QUIT.
2. FAILURE TO RESPOND TO A NOTICE OF RECALL AS SPECIFIED IN SECTION 6-L OF THIS ARTICLE FOR REGULAR WORK THREE (3) CONSECUTIVE DAYS AFTER NOTIFICATION WAS MAILED.
3. UNAUTHORIZED LEAVE OF ABSENCE.
4. UNAUTHORIZED FAILURE TO REPORT FOR WORK FOR THREE (3) CONSECUTIVE DAYS WHEN WORKING AND ON THE SENIORITY LIST.

(n) Any employee who is absent because of proven illness or injury shall maintain his seniority. Employees shall continue to pay their union dues while absent because of sickness or injury.

SECTION 7
Holidays

(a) All employees who are assigned to work on Sunday or the following holidays shall be paid double a regular day's pay, sixteen (16) straight time hours

NEW YEARS DAY
WASHINGTONS BIRTHDAY
LINCOLNS BIRTHDAY

DECORATION DAY
GOOD FRIDAY
LABOR DAY
INDEPENDENCE DAY
NOVEMBER ELECTION DAY
THANKSGIVING DAY
DAY AFTER THANKSGIVING
CHRISTMAS DAY
EMPLOYEES BIRTHDAY
MARTIN LUTHER KINGS BIRTHDAY (Jan. 15th)

Overtime work on the above days shall be paid for at double the overtime rates in accordance with Section 2-a.

(b) Employees who are not assigned to work on any of the above holidays shall nonetheless receive a regular day's pay, eight (8) straight time hours, for the holiday providing the employee has been assigned to work any one (1) day of the calendar week during which the holiday occurs. Extra men to work any two (2) days of the calendar week. An employee who has worked two (2) days or more on a higher classification shall be paid for the holiday at the higher base rate, if such classification rate differential prevails.

Paragraph (a) of this section does not apply when the holiday occurs on a Saturday. Paragraph (b) of this section shall apply when the holiday occurs on a Saturday.

(c) If any of the above listed holidays occur in a calendar week during which an employee is on vacation, the employee on vacation shall be paid for a day's pay, eight (8) straight time hours, in addition to his vacation pay for said holiday.

(d) When any of the holidays occur on Sunday and such holiday is celebrated any day before or after the holiday Sunday, all such days shall be considered as the holiday.

(e) Holiday pay shall include the night shift differential for employees who are assigned to work the night shift any one (1) day of the calendar week during which the holiday occurs.

SECTION 8

All cases of temporary transfer from or within a section shall be by classification seniority. Any employee who re-

ceives a higher rate and is transferred by company temporarily to work on a job that pays a lower arate, shall continue to receive the higher rate and will have the same rights and privileges to all increased in his old classification. Any employee who receives a lower rate and is transferred by company temporarily to work on a job that pays a higher rate shall receive the higher rate for the day.

SECTION 9

It is recognized that the customary functions of management, including the right to make such reasonable rules and regulations as the company considers necessary or advisable for the ordinary and efficient conduct of it's business, are expressly reserved to the company and except to the extent that there is no provision in this agreement spelling out or limiting the company, the usual rights of management to manage it's plant and warehouses, and direct the working force, are expressly reserved to the company.

SECTION 10

(a) All employees working in the warehouse, when the work load requires overtime, the employees in that job classification who are requested to work, must work up to two (2) hours overtime on a normal working day, Monday to Friday, inclusive. Notification of the need to work overtime should be given to the employee eight (8) hours before quitting time.

(b) When there is a job opening for truck driver, it shall be posted on a bulletin board for two (2) days. Employees may apply for same and the most senior employee shall be assigned the job provided he has the qualifications to handle the job. The final determination shall rest with the company.

SECTION 11
Separation Pay

(a) Employees who have three or more years of continuous service shall be entitled to a separation allowance when (1) they are permanently dropped from service because of a reduction in the work force arising out of the company go-

ing out of business or, (2) moving it's operations to another location beyond fifty (50) miles of it's present location.

(b) Employees shall not be entitled to a separation allowance where (1) they have less than three (3) years continuous service, or (2) they are laid off as a result of reduction in the work force, except as provided in section (a) above; or (3) they are discharged for just cause; or (4) they voluntarily resign or quit, (5) in all other cases, they do not come within coverage of section (a).

(c) The separation allowance shall be computed on the basis of forty (40) hours per week at the employee's regular straight time hourly rate.

(d) Each employee who at the time of the separation has completed three (3) years of service shall receive one (1) week of separation pay; and for those over three (3) years shall receive an additional one (1) week for each additional two (2) years of service to a maximum of six (6) weeks of separation pay.

SECTION 12
Leave of absence

(a) The Employer agrees to grant the necessary time off without discrimination or loss of seniority rights and without pay to any employee designated by the Union to attend a labor convention or service in any capacity or other official Union business provided forty-eight (48) hours written notice is given to the Employer by the Union specifying length of time off. The Union agrees that in making its request for time off for Union activities, due consideration shall be given to the number of men affected in order that there shall be no disruption of the Employer's operations due to lack of available employees.

(b) Any employee desiring leave of absence from his employment shall secure written permission from the Union. The maximum leave of absence shall be for thirty (30) days and may be extended for like periods. Permission for same must be secured from the Union. During the period of absence, the employee shall not engage in gainful employment. Failure to comply with this provision shall result in the complete loss of seniority rights for the employees involved. Inability to work because of proven illness or injury

shall not result in the loss of seniority rights. An employee at the time of termination or leave of absence can no longer be included in the group coverage of Teamsters Union Local No. 408 Welfare Fund. If an employee wishes to continue to have the same coverages after being terminated, the employee must nofify the individual insurance companies and make a request to be billed as an individual subscriber.

SECTION 13
Check Off

(a) The Employer shall deduct from the employee's wages on the first pay day of each month regular monthly membership dues as prescribed by the Local Union and approved by the Union. The Employer shall also be authorized and requested to deduct from the employee's wages, Union initiation fee in the amount set by the Local Union. Sums so deducted shall be remitted by the Employer to the Local Union together with a list of the names and addresses of the employee(s) from whom dues payments were deducted. This provision shall apply only after the employee(s) have presented signed cards authorizing the Employer to make deductions from their wages. This authorization and assignment shall remain in effect until revoked by the employee and shall be irrevocable for a period of one (1) year from the date of such authorization and assignment or until the termination date of any applicable collective bargaining agreement, whichever shall occur sooner. Unless the employee revokes it by sending written notice to the Employer and the Local Union, only during a period of fifteen (15) days immediately preceeding the termination date of any applicable collective bargaining agreement or yearly period, it shall be automatically renewed as an irrevocable authorization and assignment for successive periods of one (1) year, or until the termination date of the then applicable bargaining agreement, whichever shall be shorter, until duly revoked by the employee as herein provided.

(b) It is agreed between the company and the Union that should the company fail to comply with the terms of this section, the Union shall have the right to order a work stoppage and such a work stoppage shall not be a violation of this agreement.

SECTION 14
O.S.H.A.

If the Federal Law (O.S.H.A.) Federal Safety Act, or any State law requires employees to wear any hard hats, safety shoes, or any other safety equipment, it shall be supplied by the Employer, at no cost to the employee, as a first issue and thereafter with fair wear and tear excepted for replacement.

SECTION 15
Time Clocks

(a) All records of employees time worked shall be computed on time cards. Employees shall "punch in" their own time card at the start of the day's work and "punch out" their own time card at the completion of the day's work at the Employer's place of business.

(b) In the event any employee suffers loss of earning opportunity due to error or fault of the Employer because of any violation of this agreement, by the Employer or his representative, said employee shall be reimbursed in full for the earning opportunity lost. Earning opportunity shall mean and include a day's pay and holiday earnings.

(c) Employees who are injured during working hours shall be paid for the entire day provided the injury required immediate medical examination or treatment.

SECTION 16
Garnishment

An employee shall not be suspended or discharged because of any garnishment proceedings executed against his wages. However, if an employee does not pay the garnishment within the time specified by Federal and State law, disputes arising over this paragraph shall be referred to the Local Union, pending the decision of the Local Union.

SECTION 17

The Employer shall not require as a condition of employment that an employee purchase truck, tractor and/or tractor and trailer or other vehicular equipment or that an employee purchase or assume any proprietary interest or other obligation in the business.

SECTION 18
Separation of Employment

Upon discharge, the Employer shall pay all money due to the employee. Upon quitting, the Employer shall pay all money due to the employee on the pay day in the week following such quitting. Earned vacation time shall be included in such payment.

SECTION 19

The Employer shall not employ as new employees any person who has a full time job elsewhere.

SECTION 20
Picketing Clause

(a) It shall not be a violation of this agreement and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property involved in a labor dispute or refuses to go through or work behind any primary picket line, including the primary picket lines of unions party to this agreement, and including the primary picket lines at the Employer's place or places of business.

(b) The foregoing shall be operative only to the extent permitted by law. Nothing herein contained shall be construed to be a contract or agreement, express or implied, which in any manner violates any Federal or State law as presently enacted or as amended or interpreted during the term of this contract.

(c) In the event, however, to the extent that this section shall be determined by a court of competent jurisdcition in any manner to violate Federal or State law, as presently enacted or as amended or interpreted during the term of this contract, this section shall be inoperative, unenforceable and void.

SECTION 21

This agreement shall be binding upon the parties hereto, their successors, administrators, executors, and assigns. In the event an entire operation or any part hereof is sold, leased, transferred, or taken over by sale, transfer, lease,

assignment, receivership, or bankruptcy proceedings, such operation shall continue to be subject to the terms and conditions of this agreement for the life thereof. The specific provisions of this contract, excluding supplements or other conditions shall prevail. It is understood by this section that the parties hereto shall not use leasing device to a third party to evade this agreement. The Employer shall give notice of this existence of this agreement to any purchaser, transferee, leasee, assignee, etc., of the operation covered by this agreement, or any part hereof. Such notice shall be in writing with a copy to the Union at the time the seller, transferee, or leasee executes a contract or transaction as herein described. The Union shall also be advised of the exact nature of the transaction, not including financial details. In the event the Employer fails to require the purchaser, transferee, or leasee to assume the obligations on this contract, the Employer, including all partners thereof, shall be liable to the Union and to the employees covered for all damages sustained as a result of such failure to require assumption of the terms of this contract, but shall not be liable after the purchaser, transferree, or leasee has agreed to assume the obligations of this contract.

SECTION 22
Arbitration

(a) Should any dispute arise between the Employer and the employees, or the Employer and the Union concerning the application or interpretation of any provision of this contract, or concerning any term or condition of employment, or otherwise, the representatives of the Union and the representatives of the Employer shall attempt to adjust the controversy between themselves. In the event they are unable to adjust same, the dispute may, within two (2) days after the request of either party, be submitted to arbitration before a permanent arbitrator, to be designated by mutual agreement of the parties to this agreement. The term of the permanent arbitrator shall be for the duration of this agreement.

Until such time as a permanent arbitrator is selected by the parties, the dispute may continue to be submitted to

the New Jersey State Board of Mediation, whose decision shall be final and binding upon both parties.

If the Union decides to submit the matter to arbitration, it shall notify the company of this decision. The arbitrator shall be selected by the New Jersey State Board of Mediation, the decision of the arbitrator shall be final and binding on both parties to this agreement, as well as the employee(s) involved. The arbitrator shall be bound by this agreement and shall have no power to alter, amend, modify, add anything to, or take anything away from its provisions.

The dispute referred to herein shall include but shall not be limited to disputes concerning the discharge of an employee. The discharged employee shall have the right to be present at the proceedings. There shall be no recourse to arbitration where an employee has received prior warnings or disciplinary action, except where the Union determines that arbitration is warranted. This decision rests in the sole discretion of the Union and said decision shall be final and binding on all parties.

(b) The ONLY cause for immediate discharge or suspension of an employee shall be as follows:

1. PROVEN THEFT OF MONEY, GOODS OR MERCHANDISE DURING WORKING HOURS.
2. PROVEN DRUNKENNESS OR PROOF OF BEING UNDER THE INFLUENCE OF LIQUOR DURING WORKING HOURS.
3. CALLING AN UNAUTHORIZED STRIKE OR WALK-OUT.
4. ASSAULT ON THE EMPLOYER OR HIS REPRESENTATIVE DURING WORKING HOURS.
5. DIRECT REFUSAL TO OBEY ORDERS OF THE EMPLOYER WHICH ARE NOT A VIOLATION OF THIS LABOR CONTRACT.
6. FAILURE TO REPORT AN ACCIDENT WHICH THE EMPLOYEE WOULD BE NORMALLY AWARE OF.
7. THEFT OF TIME SHALL NOT BE A CAUSE FOR IMMEDIATE DISCHARGE. IT IS RECOGNIZED AS AN OFFENSE FOR WHICH SEVERE DISCIPLINARY MEASURE MAY BE INVOKED.

When an employee is discharged, the company shall notify the Union in writing.

(c) If, upon hearing before the arbitrator, or Employer and the Union, it is established that any of the employees are found guilty of any of the above offenses, the discharge of the employee for the above offenses may be sustained by the arbitrator.

(d) Prior to a hearing and decision by the arbitrator, the employees shall not be suspended or discharged except for offenses named above.

(e) The arbitrator shall be free, if in his discretion he deems it desirable to do so, to attempt to adjust any differences or dispute by mediation before or during the course of any arbitration.

(f) The arbitrator shall be under no necessity of taking an oath or of following any strict rules or methods of procedure, except that the arbitration hearing shall take place within one (1) week after being submitted to the arbitrator, and the arbitrator must render a decision on the dispute not later than two (2) weeks after the hearing on the dispute is concluded.

(g) A discharged employee must notify his Local Union in writing, within two (2) working days of his desire to appeal the discharge.

SECTION 23
Reports

Any employee involved in any accident shall immediately report to the Employer said accident and any physical injury sustained. When required by his Employer, the employee before going off duty and before starting his next shift, shall make out an accident report, in writing, on forms furnished by the Employer, and shall turn in all available names and addresses of witnesses to the accident. Such reports shall be made on company time. Failure to comply with this provision shall subject the employee to disciplinary action by the Employer and the Union.

SECTION 24

(a) All deliveries and pick-ups of the Employer's materials shall be performed by the employees covered by this

agreement and no outside trucks shall be hired unless all employees are working.

(b) The Employer shall not discontinue pick-up or delivery of material with his trucks without approval of the Union. Should the Employer discontinue using his trucks, the Employer must arrange for his employees to be employed by whomever does the pick-up or delivery of said merchandise at the wages and terms of this agreement.

(c) The Employer shall not hire any trucks unless all employees governed by this agreement and available for work on the Employer's seniority list are working.

The above provisions shall not restrict customers in the usual course of business as to the manner they pick-up merchandise purchased from the Employer. These provisions shall likewise not restrict the pick-up and delivery of merchandise by over-the-road operators in the usual course of business.

SECTION 25

If the employees are hired through an employment agency, the Employer is to pay the employment agency fee. Employees must be paid the prevailing wages, within the classification under the labor contract.

SECTION 26

(a) The Employer shall not establish or create a so-called "black list", nor in any way become a party to the establishing of such a "black list", that may have for its purpose the prevention of any member of the Union obtaining employment with any other Employer or company.

(b) The Employer shall not discriminate against any member of the Union who is employed by the Employer or seeking employment with the Employer because of such member's race, color, creed, nationality, or Union activities.

(c) Representatives of the Union shall be permitted at all times to enter upon the Employer's premises for the purpose of conducting the affairs of the Union in connection with any and all grievances or disputes which may arise between the Union and the Employer, or the Employer and the employee(s).

(d) The Employer shall permit representatives of the Union to post notices pertaining to Union affairs, etc., in the Employer's place of business on a bulletin board placed at a conspicious location. The bulletin board is to be supplied by the Employer.

SECTION 27
House Concerns

Where the Employer acquires or has acquired the work or trucks of any so-called house concern whose employees are being organized or are already organized, the employees of said concern shall be confined exclusively to the work they performed while in the employ of said concern. These employees shall hold seniority on the work of said concern as if they were actually employed by said concern, in addition to maintaining seniority standing on the Employer's seniority list from the day such employees started to work on the Employer's payroll. If, however, there is no work for said employees on the house concern's work, the said employees shall work in their proper seniority as of the date of hire by the Employer on the Employer's work and shall be governed by the terms of this agreement. Past practices shall prevail as to when house concern employees may exercise their company-earned seniority on jobs other than their house concern job.

SECTION 28
Safeguards

The Employer shall furnish employee(s) with all necessary safeguards when the employee(s) handle materials that may be injurious to health or safety. If the Employer does not furnish the employee(s) with such safeguards, the employee(s) shall have the right to refuse to handle such materials and disputes arising over this paragraph shall be referred to the Local Union, but pending the decision of the Local Union.

SECTION 29

The Employer shall protect employee(s) with Workman's Compensation Insurance, Social Security, and Unemployment Insurance as required by Federal and State laws.

SECTION 30
Overloads

Employees shall not be held responsible for overloaded vehicles. Whenever a driver is penalized because of such overload, the Employer shall bear all cost in connection with such overload penalty, and shall pay damages assessed against the employee, including accrued overtime, for delay and/or any lost earning opportunity that the employee might suffer. In the event the employee shall suffer a revocation of his chauffeurs' license because of a violation of any laws by the Employer, the Employer shall provide suitable and continued employment for such employee at no less than his regular earnings at the time of revocation of license, for the entire period of revocation of license, and the employee shall be reinstated in the seniority he held prior to revocation of his driver's license, after his driver's license is restored.

SECTION 31

Should any part hereof, or any provisions here contained be rendered or declared invalid by reason of any existing or subsequently enacted legislation or by any decree of a court of competent jurisdiction, such invalidation of such part or portion of this agreement shall not invalidate any remaining portions, which shall continue in full force and effect. The Union and the company shall within thirty (30) days renegotiate the affected portion of this agreement.

SECTION 32

(a) Any employee required to appear in court at the request of the Employer or at the summons of the National Labor Relations Board or the New York State Labor Relations Board, and the New Jersey State Board of Mediation as a result of some action taken on behalf of the Employer, shall be paid in full for lost time by the Employer. No payment shall be less than a full day's pay, but the employee shall be available for work if the proceedings do not extend the full day.

(b) When an employee is required to appear in court for the purpose of testifying because of an accident he may

have been involved in during working hours, such employee shall be reimbursed in full for all time lost unless the employee is proven to have been under the influence of intoxicating liquor or narcotics.

SECTION 33

Employee must make arrangements himself to continue his dues payments when he is sick, injured, on vacation, or on a leave of absence.

SECTION 34
Union Security

(a) All present employees who are members of the Union on the effective date of this agreement or on the date of execution of this agreement, whichever is the later, shall remain members of the Union in good standing as a condition of employment. All present employees who are not members of the Union, and all employees who are hired thereafter shall become and remain members of the Union in good standing as a condition of employment on and after the 31st day following the beginning of their employment, or on and after the 31st day following the effective date of this agreement or the execution date of this agreement, whichever is the later. The Employer, upon notice from the Union that an employee has failed to tender the periodic dues and/or initation fee uniformly required as a condition of acquiring and retaining membership within the time above specified, shall discharge such employee within forty-eight (48) hours after receipt of written notice from a properly authorized official of the Union. The Employer shall provide the Union with the names of all new employees. This provision shall be made and become effective as of such time as it may be made and become effective under the provisions of the National Labor Relations Act, but not retroactively.

(b) When the Employer needs additional employees, he shall give the Union equal opportunity with all other sources to provide suitable applicants, but the Employer shall not be required to hire those referred by the Union.

(c) The Employer shall promptly notify the Union when new employees are to be hired. The Union shall have the

right to send applicants for the job or jobs, and the Employer agrees to interview such applicants and give the same interview considerations to Union sent applicants as is given to applicants from other sources. This provision shall not be deemed to require the Employer to hire Union applicants or to preclude the Employer from hiring employees from other sources. The Employer reserves the right to finally pass on the qualifications and experience of all applicants for employment.

(d) No provision of this article shall apply in any State to the extent that it may be prohibited by State law. If under applicable State law, additional requirements must be met before any such provision may become effective, such additional requirements shall be first met.

(e) In the event of any change in the law during the term of this agreement, the Employer agrees that the Union will be entitled to receive the maximum Union Security which may be lawfully permissible.

(f) If any provision of this article is invalid under the law of any State wherein this agreement is executed, such provision shall be modified to comply with the requirements of State law or shall be renegotiated for the purpose of adequate replacement. If such negotiations shall not result in a mutually satisfactory agreement, the Union shall be permitted all legal and economic recourse.

SECTION 35

The President shall affix his signature to all collective bargaining agreements made and entered into on behalf of any and all members of this Local Union.

SECTION 36

It is specifically agreed that each and every benefit heretofore enjoyed by the employees covered by the collective bargaining agreement of any of the Local Unions signatory hereto which has been, may be, or may have been superior to that provided by this agreement, whether such superiority be in form of monetary value, conditions of employment, welfare benefits, pension benefits, or even more personal preference shall continue in effect for said employees with respect to their employment by Employers under contract

with this Local Union for the period of this agreement, as if the said superior benefits had been specifically extended by the provisions of this agreement.

SECTION 37

(a) When two or more companies merge their operations, then the employees of the respective companies shall all be placed on one seniority roster in the order of the earliest date of hire of each of the employees with their respective company.

(b) When one company acquires or purchases control of the business of another company, then the employees of the company so acquired or purchased shall be placed at the bottom of the acquiring or purchasing company's seniority roster in the order of their payroll or company seniority with the former company.

SECTION 38
Owner Drivers

(a) The Employer shall not hire any trucks unless all employees governed by this agreement on the Employer's seniority list are working.

(b) Owner-drivers shall not be used until all available employees on the seniority list of the Employer are working.

(c) The company shall have the right, subject to the applicable terms of this agreement, to deal with or enter into agreement with, or otherwise utilize the services of owner-drivers, provided all such owner-drivers shall be members in good standing of the Union or make immediate application for membership and become and remain members in good standing within eight (8) days after starting work under the lease agreement. For the purpose of this agreement, the term owner-driver shall mean only those individuals who are affiliated by lease with the Employer and who operate as drivers of their own vehicle and who do not employ other drivers. Nothing in this article shall apply to any equipment leased, except where the owner-driver also drives and does not employ a driver.

(d) All sections of Union Security shall refer to owner-drivers.

(e) Whenever an owner-driver is engaged, the Employer must in compensating such owner-driver, separate the payment for truck rental from the wages paid to him for personal services so that the sum of money paid to him for personal services is not less than what would be received by such owner-driver as wages in accordance with the wage rates setforth in Section 2-a of this agreement, as an employee of the Employer. The Employer's pay and time card records relating to owner-drivers shall be open for inspection of Union representatives. Owner-drivers shall be entitled to all of the other benefits provided for in this agreement.

SECTION 39
Shop Steward

(a) The Employer recognizes the right of the Union to designate job stewards and alternates from the Employer's seniority list. The authority of job stewards and alternates so designated by the Union shall be limited to and shall not exceed the following duties and activities:

1. THE INVESTIGATION AND PRESENTATION OF GRIEVANCE IN ACCORDANCE WITH THE PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT.
2. THE COLLECTION OF DUES WHEN AUTHORIZED BY APPROPRIATE LOCAL UNION OFFICIAL.
3. THE TRANSMISSION OF SUCH MESSAGES AND INFORMATION WHICH SHALL ORIGINATE WITH AND ARE AUTHORIZED BY THE LOCAL UNION OR ITS OFFICERS PROVIDED SUCH INFORMATION AND MESSAGE (a) HAVE BEEN REDUCED IN WRITING, OR (b) IF NOT REDUCED IN WRITING, ARE OF A ROUTINE NATURE AND DO NOT INVOLVE WORK STOPPAGE, SLOW DOWNS, REFUSALS TO HANDLE GOODS OR ANY INTERFERENCE WITH THE EMPLOYER'S BUSINESS.

(b) Job stewards and alternates have no authority to take strike action or any other action interrupting the Employ-

er's business, except as authorized by official action of the Union.

(b) The Employer recognizes these limitations upon the authority of job stewards and their alternates and shall not hold the Union liable for any unauthorized acts. The Employer in so recognizing such limitations, shall have the authority to impose proper discipline, including discharge, in the event the shop steward has taken unauthorized strike action, or work stoppage in violation of this agreement. The Union reserves the right to remove the shop steward at any time for the good of the Union.

(d) A shop steward shall not be considered an officer of the Union.

(e) The shop steward shall start work on the earlier starting time and stay at the terminal until all work is allocated to the men and take care of any complaints. If there are no complaints, the steward will go about his assigned duties. The steward has the option of starting work in line with his seniority or going out on assigned work if he prefers. He shall not be discriminated against in the allocation overtime.

SECTION 40

(a) All regular employees covered by this agreement shall be paid in full each week. Not more than one (1) week's pay shall be held on an employee. The Employer agrees to pay additional or extra men at the completion of the work whenever it is possible to do so, or will mail a check within twenty-four (24) hours to the employee, at the address designated by the employee.

(b) When the regular pay day occurs on a holiday, the Employer shall pay employees on a regular work day immediately preceeding the holiday.

(c) Each employee shall be provided with a statement of gross earnings on an itemized statement of all deductions made for any purpose.

SECTION 41

The Employer shall have a right to establish company rules so long as they do not conflict with the provisions of

this contract. Before any rule become effective, they shall meet with the approval of the Union.

SECTION 42

It is agreed and understood by the parties, that an Employer signing this agreement is automatically signing and agreeing to the trust indenture of Teamsters Union Local No. 408 Funds.

SECTION 43
Health and Welfare

(a) The Employer during the term of this agreement shall pay and contribute to Teamsters Union Local No. 408 Welfare Fund the sums specified below monthly for each employee in the bargaining unit represented by Teamsters Union Local No. 408 to provide health and welfare benefits for the employees...

EFFECTIVE MAY 1, 1979.....$135.00 A MONTH PER MAN
EFFECTIVE MAY 1, 1980.....$150.00 A MONTH PER MAN
EFFECTIVE MAY 1, 1981.....$165.00 A MONTH PER MAN

The Employer shall contribute the sum monthly for each employee in the bargaining unit under the terms of this Labor Contract into the Welfare Fund of Employers and Teamsters Union Local No. 408, in accordance with the instructions and rules of the Fund for administration and other expenses of the Fund and for the Fund to provide the following coverages:

1. A $10,000.00 Life Insurance.
2. A $10,000.00 Accidental Death and Dismemberment Insurance on occupational and non-occupational basis.
3. A sick and non-occupational accident insurance which shall provide that the employees in case of sickness shall receive the payment of $117.00 per week commencing on the 4th day of sickness for a maximum of 26 weeks for each sickness; and shall provide that the employees in case of a non-occupational accident shall receive the payment of $117.00 per week commencing from the first day of the non-occupational accident.

4. A $400.00 medical reimbursement plan annually for employees and their family, which shall include doctor visits to the home of the employee. The maximum payment per each treatment in a physician's office is $7.00; the maximum payment per each treatment elsewhere to be $9.00. All visits to be paid up to the maximum medical benefit of $400.00 annually for the employee and his family.
5. Comprehensive contract of Hospital Service Plan of New Jersey (BLUE CROSS PLAN) and the contract of medical surgical plan (BLUE SHIELD PLAN) or their equivalent for the employee and the employee's family.
6. An Eye Glass Plan for the employee, or employee's spouse, or unmarried children (under the age of 19) which shall provide upon receive in the Fund office an itemized paid bill from your optician or optometrist that said employee shall receive an allowance "each contract year" towards eye glasses and/or eye examination for the Employee, or employee's spouse, or unmarried children.
7. G.H.I. DENTAL PLAN: a dental plan for the employee, the employee's spouse and unmarried children (under age of 19).

The $10,000.00 Life Insurance Policy and the $10,000.00 Accidental Death and Dismemberment Insurance Policy which shall provide that the employee who leaves the employ of the Employer may pay the regular premiums and be covered by the policies. The above coverage shall be provided each employee without the employee being required to submit to a physical examination.

(b) The Employer shall contribute the monthly contribution on or before the first day of each calendar month. If the Employer fails to make his monthly contribution on or before the 20th day of each calendar month, the Fund shall assess the Employer a penalty of $1.00 for each employee, for each month for which the contribution is not made. The Fund may further assess said Employer for any and all expenses, court costs, attorney fees, telephone and correspondence cost, etc., which the Fund incurs in collecting or attempting to collect delinquent payments from said Employer.

(c) When a new employee commences employment with the Employer and is employed twenty (20) days during any part of the first calendar month, that the employee is employed, the Employer shall make the first monthly contribution for the sum of $15.00 for the month which the employee commenced employment; and the Employer's second monthly contribution shall be due and owing on the first day of the calendar month immediately following the employee's employment in the amount setforth as specified in Section 43-a. The Employer is responsible for the coverage of disability for the period of the first month. A new employee who was not previously eligible for coverage under the terms of this agreement shall be eligible commencing on the day when the second monthly contribution of his Employer is due and owing to the Welfare Fund.

(d) A new employee of the Employer who has not previously been eligible under the provision of this agreement will not be eligible for coverage under the Eye Glass Plan and Dental Plan of this agreement until four (4) months after the said new employee has commenced employment with his Employer and provided that within the four (4) month period, the Employer has not terminated said employee's employment.

(e) Failure on the part of the Employer to pay the monthly contribution specified herein into the said Welfare Fund for each and all employees shall leave the Employer with full responsibility to assume and pay the benefits the employee(s) and his (or their) family are entitled to under the terms of this labor contract.

(f) The Employer shall continue to contribute the monthly payment into the Fund for all employees covered by this labor contract even though some of the employees may not work because of lack of work, provided the employee continue to report to maintain his seniority. Employees who are permanently laid off from the employ of the Employer shall no longer be covered by the Health and Welfare Plan. However, when the employee returns to work, he shall be covered by the Health and Welfare Plan on the first day.

(g) Employees who are presently employed and covered by the Welfare Fund shall continue to be insured under the

Welfare Fund and shall be given proof of coverage in the form of policies. New employees shall be insured under the Health and Welfare Plan immediately after the second monthly contribution of his Employer is due and owing to the Welfare Fund and shall be given proof of coverage in the form of policies.

(h) Employees of the Employer who are not working due to illness or inuury shall hold seniority during said illness or injury, and the Employer shall contribute the sums specified herein monthly to the Joint Welfare Fund of Employers and Teamsters Union Local No. 408, for each of said employees for the period of one (1) year during their illness or injury.

(i) If the Employer fails to notify the Welfare Fund of the termination of a employee, the Employer shall be required to make the monthly contribution to the Fund for every month after the employee's termination, and the Employer shall be liable for said monthly contribution until the Employer notifies the Welfare Fund in writing of the termination of the employee.

(j) An employe, at the time of termination, can no longer be included in the group coverage of Teamsters Local Union 408 Welfare Fund. If an employee wishes to continue to have the same coverages after being terminated, the employee must notify the individual insurance companies and Blue Cross/Blue Shield and make a request to be billed as an individual subscriber.

(k) The Employer agrees that if the average cost of the Health and Welfare insurance coverages is increased, the Employer shall bear the increased coverage cost by remitting sufficient monies to the Fund for said cost, in addition to his monthly contribution for each employee.

(l) The Employer agrees to immediately join and concur with the Union in the execution of such petitions, applications, and forms that are required to be filed with any State or Governmental agencies.

(m) The Joint Welfare Fund of Employers and Teamsters Union Local 408 shall be administered by a Board of Trustees of the said Welfare Fund composed of four (4) Trustees

from the Employers who have a signed labor contract with the Union, and four (4) Trustees from the Union.

(n) The Trustees shall employ a person to be administrator to the Fund. The administrator shall be in charge of the Fund office and administer the affairs of the Fund under the supervision of the Trustees. The salary, duties, and term of office of the administrator shall be determined by the Trustees.

(o) Trustees are vested with full power and authority to administer the Fund which shall be utilized to purchase all insurance benefits for the employees as setforth in this section. The salary, duties, and term of office of the Trustees shall be determined by the Trustees.

(p) Trustees shall submit a written report for the fiscal year to the Employers and the Union as to the income, expenses, and financial status of the Fund.

(q) Except for the above, the Trustees shall not be liable nor accountable for the administration of the Fund.

(r) Trustees shall assess the Employer with penalties for any and all delinquent payments that are due the Fund provided herein or as the trustees, in their discretion, may otherwise determine.

(s) It is agreed between the Employer and the Union that should the Employer fail to comply with the terms of this section, the Union shall have a right to order a work stoppage and such a work stoppage shall not be a violation of this agreement. Trustees shall have the right to receive, collect, sue, demand, and institute proceedings in any court or other tribunal for the purpose of enforcing payment of any of the contributions required to be made under the agreement. The delinquent Employer shall be further obligated to pay to the Welfare Fund all court cost, reasonable attorney fees, and other expenses incurred by the Trustees in enforcing or attempting to enforce payment of any of the contributions required to be made under this agreement.

(t) No employee shall have the option to receive instead of the benefits provided for by the Welfare Fund any part of the amounts contributed by the Employer into the Fund, and no employee shall have the right to assign any benefits to which he or his dependents may be entitled to under any

of the agreements and declarations of the Fund or to receive a cash consideration in lieu of the benefits established by the Fund either upon termination of the Fund herein created or through severance of his employment or otherwise.

(u) Title to all monies paid in the said fund shall be vested in and remain exclusively in the Trustees, and it is the intention of the parties hereto that said Fund shall constitute an irrevocable trust and that no benefits or monies payable from this Fund shall be subject to in any manner to sale, alienation, transfer, assignment, pledge, encumbrance or change and any attempt to do so shall be void. The monies paid into said Fund shall not constitute or be deemed wages to the individual employee nor shall said monies in the manner be liable for or subject to debts, contract, torts, and liabilities of any of the employees or parties entitled to such money, that is, any of the benefits provided for under the terms of this agreement.

(v) The Employer shall contribute the monthly payment into the Fund for all employees who have been suspended or discharged from the employ of the Employer where cases where the suspended or discharged employe is waiting for an arbitration hearing and/or decision thereof, and contribute the monthly payment until such time as the decision of the hearing is received by the Union and the Employer.

(w) When Blue Cross/Blue Shield has an increase in coverage during the term of this agreement, the Employers and Teamsters Union Local 408 hereby agree to said increase in contributions and shall apply same to this agreement.

(x) The Employer agrees to make contributions to the Welfare Fund pending the negotiation of a new agreement.

SECTION 44
Vacations

ALL EMPLOYEES ON THE PAYROLL ON MAY 1st OF EACH YEAR SHALL RECEIVE A VACATION WITH PAY IN ACCORDANCE WITH THE FOLLOWING SCHEDULE:**

(a) All employes who have beem employed less than eight (8) months shall receive one (1) day of vacation with pay in advance for each (2) months of service.

(b) All employees who have been employed for a period of eight (8) months shall receive one (1) week's vacation with pay in advance, forty (40) straight time hours regardless of the number of days worked during the anniversary year.

(c) All employees who have been employed for a period of one (1) year shall receive two (2) week's vacation with pay in advance, eighty (80) straight time hours regardless of the number of days worked during the eight (8) month anniversary period.

(d) All employees who have been employed for a period of five (5) years or over shall receive three (3) week's vacation with pay in advance, one hundred and twenty (120) straight time hours regardless of the number of days worked during the anniversary year.

(e) 1. All employees who have been employed eleven (11) years or over and who have worked 125 days of the contract year shall receive four (4) week's vacation with pay in advance, one hundred and sixty (160) straight time hours, in the first contract year and in the second contract year it shall be ten (10) years or over.

2. All employees who on May 1st of each year have thirteen (13) or more years of continuous service shall receive one (1) day's pay (eight (8) hours), without time off, for each year of service over thirteen (13) years to a maximum of five (5) days at his regular hourly base rate.

(f) All time that employees have been deprived of working because of injury suffered while working for the Employer shall be credited to the employee as time worked and shall be included in the time required for vacations.

(g) If during any week any employee is unable to work a full week because of Federal or State regulations, he shall be credited with a full week's work.

(h) Vacations for all eligible employees shall be based on the average number of hours worked per week during the contract year (maximum of forty-eight (48) hours) accord-

ing to their classification on the basis of straight time wages prevailing each contract year.

(i) All days employees have received pay for (excluding overtime) including vacation days that employees were paid for after qualifying for a shorter period of vacation in the same contract year shall be credited to the days required for vacations.

(j) All weeks in the period beginning May 1st, and ending October 31st, of each year, shall constitute the vacation period, unless mutually agreed upon between the Employer and the employees. Employees may take their vacation either before or after the vacation period, providing the Employer agrees.

(k) The Employer shall assign an equal number of employees from each job classification for vacations. However, the employees in seniority order, according to job classification, shall have preference of selecting the week(s) they desire for their vacation.

(l) All time that suspended or discharged employees have not worked by reason of waiting for arbitration and decision thereof shall be credited to the time required for vacation, regardless of the outcome of the arbitration.

(m) Vacation schedule (which employees and the week(s) they are to go on vacation) shall be decided between the Employer and the employees and posted before May 1st of each contract year.

(n) Employees leaving or discharged from the employ of the Employer shall receive such proportionate share of vacation pay as have accrued to the date of termination.

(o) If an employee is out sick, his vacation pay shall be paid to him as soon as time is possible.

(p) In case of death of an employee who is eligible for vacation, the vacation wages shall be paid to the employee's estate.

(q) Vacation pay shall include the night shift differential for employees who work the night shift on a majority of the qualifying working days.

(r) Vacations are compulsory for all employees under the bargaining unit.

(s) The pay of all employees shall be computed on the basis of the wage classification in which the employee was paid for the majority of the days during the qualifying period.

(t) Vacations must be taken in the contract year and will not accumulate from year to year.

(u) The vacation period of each qualified employee shall be as follows: all employees receiving one (1) week's vacation shall take said vocation during the summer months. All employees receiving two (2) week's vacation shall take one week in the summer and one week in the winter. All employees receiving three (3) week's vacation shall take two (2) week's in the summer and one (1) week in the winter. All employees receiving four (4) week's vacation shall take two (2) weeks in the summer and two (2) weeks in the winter. "SUMMER PERIOD" is from May 1st, to October 31st.; and the "WINTER PERIOD" is from November 1st, to April 30th.

**EMPLOYEE'S ANNIVERSARY DATE SHALL BE THE BASIS FOR ESTABLISHING THE VACATION EARNED WITHIN EACH CONTRACT YEAR.

SECTION 45

This contract shall be retroactive as of May 1, 1979.

SECTION 46
Pension Plan

(a) For the objects and purposes setforth in a certain agreement and declaration of trust executed between the certain Employers and the Union and any amendments or supplements thereto, the Employer agrees to contribute to the Pension Fund of Teamsters Union Local No. 408 the sums as specified below, per hour for each straight time hour worked from Monday to Saturday, by each employee and for each employee covered by this agreement...

EFFECTIVE MAY 1, 1979...FIFTY CENTS (50¢) PER HOUR PER MAN

EFFECTIVE MAY 1, 1980...SIXTY CENTS (60¢) PER HOUR PER MAN

EFFECTIVE MAY 1, 1981...SEVENTY CENTS (70¢) PER HOUR PER MAN

(b) The second monthly contribution to the Fund and all accumalations thereon shall be used to provide for Pension or Retirement Benefits as provided in a plan to be selected by the Trustees of the Fund and to be used for such other purposes setforth in this agreement and declaration of trust governing the Trustees in the administration of the Pension Fund.

(c) Trustees in setting up a Pension Plan or Retirement Benefits shall be the sole judges in determining the eligibility requirements and the rights of any employees thereunder.

(d) The Employer agrees to immediately join and concur with the Union and the Trustees, if necessary, in executing such petitions, applications and forms that are required to be filed with any State or Governmental Agencies and agrees to provide such information as the Trustees, banking institutions, and insurance companies may request in connection with the operation of the Pension Fund and Plan.

(e) Trustees of the Pension Fund or Plan shall have such rights and duties as setforth in the Plan and in the agreement and declaration of trust and any supplements or amendments thereto.

(f) It is agreed between the Employer and the Union that should the Employer fail to contribute the sum per straight time hour for each straght time hour worked for each employee as required by this section, the Union shall have the right to order a work stoppage of the employees of the Employer and that such a work stoppage shall not be a breach of this labor contract.

(g) Whenever Teamsters Union Local 408 Pension Plan merges or combines with any other pension fund or plan, such merger or combination shall be binding upon the parties hereto. The Employer agrees to make pension contributions to the party or parties designated by the Union or Fund to receive said contributions. Failure to comply with this requirement shall constitute cause for the Union to

strike or picket the company, any other provision in the agreement notwithstanding.

(h) All vacation and holiday pay to be included in all pension contributions.

(i) It is agreed and understood by the parties, that an Employer signing this agreement is automatically signing and agreeing to the trust indentures of Teamsters Union Local No. 408 Funds.

SECTION 47
Death In Family

In case of a death in an employee's family, i.e., SPOUSE, MOTHER, FATHER, SISTER, BROTHER, CHILDREN, MOTHER IN LAW, FATHER IN LAW, the Employer shall grant such employee the maximum of three (3) days off with pay for the express purpose of attending services for the deceased. Death certificate or other satisfactory proof of death must be submitted to the Employer. The employee must be on the seniority list for at least three (3) months.

SECTION 48
Probationary Period For All New Employees

All newly hired employees shall be considered as temporary employees on probation for a period of thirty (30) days from the date upon which they started. During this period, they may be discharged by the Employer for any reason.

SECTION 49
Uniforms

The Employer agrees that if an employee is required to wear any kind of uniform as a condition of his continued employment, such uniform shall be furnished by and maintained by the Employer, free of charge, at the standard required by the Employer.

SECTION 50

Any employee who has private business to take care of shall tell the Employer the night before or within two (2) hours the following morning; and the provision does not apply to truck drivers. Drivers must complete their runs.

SECTION 51

When drivers or outside service men require help, the same shall be looked into and such driver or outside service men shall be given the required help. The company is to use their discretion.

SECTION 52

The Employer recognizes the jurisdiction of the Union over the drivers of all vehicles equipment used in the delivery or distribution of materials, machinery, etc., to and from all customer's sites and in and around said sites and agrees that such work shall be performed by members of the Union.

SECTION 53

Compulsory overtime for all employees working in the warehouse: when the work load requires overtime, the employees in that job classification are requested to work, must work at least two (2) hours overtime on a normal work day, Monday to Friday, inclusive. Notification of the need to work overtime will be given to the employee eight (8) hours before their normal quitting time.

SECTION 54
Sick Days

Employees who, on May 1, 1979, have one (1) year seniority shall be granted seven (7) days sick leave absence during the contract year, commencing May 1, 1979. Employees who have less than one (1) year's seniority shall receive one (1) day sick leave absence for each two (2) months of service. For each day of sick leave that an employee does not use, he will be paid for those days of the contract year. No sick pay day allowance will be granted during the first three (3) months of employment.

SECTION 55
Personal Day

Employees who, on May 1, 1979, have one (1) year seniority, shall be granted three (3) personal days (with pay) during the contract year commencing May 1, 1979. Employees who have less than one (1) year's seniority shall receive

one (1) personal day for each four (4) months of service. For each personal day that an employee does not use, he will be paid for those days of the contract year. No personal day allowance will be granted during the first three (3) months of employment.

SECTION 56
Jury Duty

If an employee is required to serve as a juror, he must immediately upon receipt of jury notice, advise the company. The Employer will pay the employee during the period of usual service, up to a maximum of ten (10) days, the differences between his regular earnings on the basis of an eight (8) hour day (at the employee's basic hourly rate) and what he receives as a juror. The employee must be on the seniority list for at least three (3) months.

SECTION 57
Cost-Of-Living

Effective November 1, 1979, and semi-annually thereafter, a cost of living adjustment will be paid based on the formula of one cent (1¢) per hour for each .3 point increase in the Consumers Price Index for Urban Wage Earners and Clerical Workers (revised series) (1967=100) with a cap of fifteen cents (15¢).

SECTION 58

It is hereby agreed between the Employer and the Union that all terms and conditions of this labor contract shall be effective as of MAY 1, 1979, and shall and shall continue in full force and effect until midnight, APRIL 30, 1982. In witness whereof, the parties hereto set their hands this date: July 11, 1979.

FOR THE EMPLOYER Bildisco

Arthur Gordon

TEAMSTERS UNION LOCAL 408

/s/ _____

ANTHONY CUSANO,
Vice-Pres. & Bus. Mgr.

_____

WITNESS

SUPREME COURT OF THE UNITED STATES

No. 82-818

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION, ET. AL.

ORDER ALLOWING CERTIORARI. Filed January 17, 1983.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is consolidated with case No. 82-852, *Local 408, International Brotherhood of Teamsters, etc.* v. *National Labor Relations Board, et al.*, and a total of one hour is allotted for oral argument.

SUPREME COURT OF THE UNITED STATES

No. 81-852

LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ETC., PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ORDER ALLOWING CERTIORARI. Filed January 17 1983.

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No. 82-818 and No. 82-852

Office-Supreme Court, U.S.
DEC 10 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION, *ET AL.*,

Respondents.

LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v.

BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION, *ET AL.*,

Respondents.

BRIEF OF RESPONDENTS, BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION, IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Counter-Statement of Questions Presented for Review

The petitions for a Writ of Certiorari filed herein by the National Labor Relations Board (NLRB) and Local Union No. 408, I.B.T. (the Union) present the following questions:

1. Whether the court of appeals adopted the correct legal standard, in this case of first impression, to determine under what circumstances a debtor in possession under Chapter 11 of the Bankruptcy Code should be permitted to reject a collective bargaining agreement?

2. Whether the court of appeals correctly decided that until a debtor in possession's adoption of a collective bargaining agreement, the debtor in possession is not bound by the bargaining requirements for midterm contract modification contained in 29 U.S.C. §158(d).

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BRIEF OF RESPONDENTS, BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION, IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Respondents, Bildisco and Bildisco, Debtor in Possession, respectfully submit this brief in opposition to the petitions for a Writ of Certiorari filed by the National Labor Relations Board (NLRB) and Local Union No. 408, I.B.T. (the Union).

Counter-Statement of the Case

On April 14, 1980, Appellee, Bildisco, a general partnership of the State of New Jersey filed a voluntary petition for reorganization under Chapter 11 of Title 11 of the United States Code. Subsequent to the filing the bankruptcy court authorized Bildisco to operate its business as a debtor-in-possession.

In the course of the Chapter 11 proceedings, Bildisco filed a motion, pursuant to Section 365(a) of the Bankruptcy Code, 11 U.S.C. §365(a), for an Order authorizing the rejection of the May 1, 1979 collective bargaining agreement between it and the petitioner Union.

A hearing on Bildisco's motion was conducted by the bankruptcy court on January 5, 1981. The sole witness presented by either party was Salvatore Valente, one of the partners of Bildisco, whose responsibilities included staffing and overseeing the staffing of the business. Mr. Valente testified that while at the time of the filing of its Chapter 11 petition, Bildisco had employed eighteen union members, as of the date of the hearing this number had been reduced to three. Mr. Valente estimated that by rejecting the union contract his business would save approximately $100,000 in 1981. Mr. Valente further testified that Bildisco was projecting a potential $100,000. profit for the year following the confirmation of the Chapter 11 proceedings and that accordingly the anticipated savings of $100,000 flowing from rejection of the

collective bargaining agreement would represent a "one hundred percent difference in potential."

The Union presented no evidence with respect to the motion either in refutation of Mr. Valente's testimony or to establish any hardships to Bildisco's union employees which would result from rejection of the collective bargaining agreement.

On January 15, 1981, the bankruptcy judge entered an order granting the debtor-in-possession's motion to reject the collective bargaining agreement. The Union lodged an appeal from this order with the United States District Court on January 23, 1981.

On May 4, 1981 the district court issued a bench opinion affirming the order of the bankruptcy court. On June 5, 1981, the Union filed an appeal to the United States Court of Appeals for the Third Circuit.

On July 31, 1980, subsequent to the commencement of Bildisco's Chapter 11 proceedings, the General Counsel of the NLRB issued a complaint alleging that Bildisco and Bildisco, Debtor in Possession, had engaged in unfair labor practices in violation of Sections 8(a)(1) and (5) of the National Labor Relations Act by making unilateral changes in the collective bargaining agreement. An amended complaint was issued by the Board on October 8, 1981.

On January 27, 1981, twelve days after the bankruptcy court authorized rejection of the collective bargaining agreement, the NLRB's General Counsel filed a motion for summary judgment based upon Bildisco's failure to file a timely answer to the complaint. On January 29, 1981, counsel for Bildisco requested that the NLRB defer decision on the summary judgment motion for sixty days to allow Bidisco to obtain an order from the bankruptcy

court authorizing it to retain special counsel to represent it before the NLRB. By letter dated February 3, 1981, the General Counsel opposed this request.

On February 9, 1981, the NLRB issued a notice to show cause why summary judgment should not be granted. Bildisco filed a response to the order to show cause on February 20, 1981, stating that its failure to file a timely answer was due to the disruption caused by the reorganization proceedings, and that it had not yet received bankruptcy court permission to retain special labor counsel.

Bildisco further informed the NLRB that the bankruptcy court had granted its motion for permission to reject the collective bargaining agreement, and argued that, based upon the retroactive effect of rejection, no contract existed between it and the Union after April 14, 1980. Bildisco also argued that any unpaid contributions due prior to the date of the petition did not constitute unilateral changes in the agreement, but were claims subject to allowance in the Chapter 11 proceedings.

On April 23, 1981, notwithstanding its notification of the rejection of the contract, the NLRB granted the General Counsel's motion for summary judgment, stating that Bildisco had not shown good cause for its failure to file a timely answer to the amended complaint. The order directed Bildisco and Bildisco, debtor in possession, to make all delinquent contributions and payments plus interest, to honor the terms of the collective bargaining agreement, and to post appropriate notices.

The NLRB made a "finding of fact" that the debtor in possession was at all material times the alter ego of the pre-bankruptcy company.

The NLRB applied to the Third Circuit for enforcement of its order, which application was consolidated with the Union's appeal from the district court's affirmance of the bankruptcy court's order authorizing rejection.

On September 29, 1982 the court of appeals issued its opinion. The court held that a collective bargaining agreement is an executory contract subject to rejection by a debtor in possession, but vacated the district court order and remanded the case for reconsideration in light of the special standards it enunciated for rejection of a collective bargaining agreement. The court also refused to enforce the NLRB's order concluding that the rejection of the contract was retroactive to the date of the filing of the Chapter 11 petition, and that if the contract was properly rejected, no unfair labor practices had been committed since no agreement was in effect between the debtor in possession and the Union. The court further held that any pre-Chapter 11 obligations arising out of the agreement were properly the subject of claims allowable in the reorganization proceeding.

Summary of Argument

I. The opinion of the court of appeals in this case of first impression under the Bankruptcy Reform Act of 1978 set forth the correct standard to be applied in determining whether a debtor in possession under Chapter 11 of Title 11 of the United States Code will be permitted to reject a collective bargaining agreement under 11 U.S.C. §365(a).

II. The opinion of the court of appeals correctly determined that a debtor in possession is not a party to a collective bargaining agreement entered into by the debtor and is not obligated to bargain for mid-term contract modifications pursuant to 29 U.S.C. §158(d).

ARGUMENT

The considerations governing review on Writs of Certiorari are set forth at Rule 17 of the rules of this Court. As stated therein, a review on Writ of Certiorari is not a matter of right and will be granted "only when there are special and important reasons therefore." In the instant case, an analysis of the opinion of the court of appeals reveals that none of the specific criteria set forth in Rule 17 are present and that no other special and important reasons exist for this Court to grant review on the petitions.

I

The opinion of the court of appeals in this case of first impression under the Bankruptcy Reform Act of 1978 set forth the correct standard to be applied in determining whether a debtor in possession under Chapter 11 of Title 11 of the United States Code will be permitted to reject a collective bargaining agreement under 11 U.S.C. §365(a).

Petitioners in requesting this court to grant their Writs place primary reliance on the contention that the decision of the Third Circuit in *In re Bildisco*, 682 F.2d 72 (3d Cir. 1982) creates a conflict between the Second and Third Circuits as to the proper standards to be applied in determining whether a debtor in possession in reorganization proceedings under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §1101 *et seq.*, should be permitted to reject a collective bargaining agreement entered into prior to commencement of the reorganization proceedings (NLRB's petition, pp. 8-9; Union's petition p. 24). This argument, however, is patently incorrect in that it fails to recognize that the

case before the Third Circuit was, in fact, a case of first impression under the Bankruptcy Reform Act of 1978. The decision of the Second Circuit in *Brotherhood of Railway, Airline and Steamship Clerks* v. *REA Express, Inc.*, 523 F.2d 164 (2d Cir.) *cert. denied*, 423 U.S. 1017, 1073 (1975), which Petitioners assert to be in conflict with the Third Circuit's decision, was on the other hand, decided under the former Bankruptcy Act which was repealed by Section 401 of the Bankruptcy Reform Act of 1978 enacted on November 6, 1978.

This significant distinction did not escape the Third Circuit which noted at page 76 of its opinion:

> "The rejection of a collective bargaining agreement under the new Bankruptcy Code, which implicates a significant confrontation of labor and bankruptcy policies, is a matter of first impression in the courts of appeals."

Neither the Second Circuit nor any of the other circuit courts of appeal have decided the issue before the Third Circuit—the standards for rejection of a collective bargaining agreement under the provisions of Section 365 of the new Bankruptcy Code, 11 U.S.C. §365. The Second Circuit's decision in *BRAC* v. *REA Express, Inc., supra* was decided under Section 313(1) of the former Bankruptcy Act, former 11 U.S.C. §713, which provided simply:

> "Upon the filing of a petition, the court may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon it—
>
> (1) permit the rejection of executory contracts of the debtor, upon notice to the parties to such contracts and to such other parties in interest as the court may designate;"

As contrasted with the rather broad-brush provisions of former Section 313, Section 365 of the Bankruptcy Code is a carefully drawn statute containing a detailed list of exception to the right of rejection and conditions for and exceptions to the right of assumption of executory contracts.

No conflict exists among the Second and Third Circuits therefore for the simple reason that the Third Circuit was, as it recognized, writing on a clean slate, and dealing with a statutory framework different from that confronted by the Second Circuit in *BRAC* v. *REA Express, Inc., supra.*

The enactment of Section 365, with its detailed treatment of the issue of rejection and assumption of executory contracts, subsequent to the *REA Express* decision, moreover, was correctly deemed by the Third Circuit as a clear indication that Congress did not intend that decision to have continuing validity. As Judge Aldisert noted in *In re Bildisco, supra* at p. 78:

> "In enacting §365, Congress provided no indication that collective bargaining agreements were to be immune from rejection and thus unique among executory contracts. Indeed, the few inferences of congressional intent that may be gleaned from the Code and its legislative history are to the contrary. First, notwithstanding several judicial decisions holding collective bargaining agreements susceptible to rejection. Congress afforded collective bargaining agreements no special treatment. Significantly, Congress did provide detailed provisions for acceptance of executory contracts such as shopping center leases, §365(b)(3), and regarding transactions in commodities futures contracts, §§765, 766. Moreover, one particular species of collective bargaining agreement was singled out:
>
> Notwithstanding section 365 of this title, neither the court nor the trustee may change the wages or

> working conditions of employees of the debtor established by a collective bargaining agreement that is subject to the Railway Labor Act (45 U.S.C. 151 et seq.) except in accordance with section 6 of such Act (45 U.S.C. 156).

11 U.S.C. §1167. The sheer complexity of the Bankruptcy Reform Act might preclude our use of §1167 as definitive proof that every other collective bargaining agreement may be rejected, but the section permits an inference that, with this one exception, Congress did not intend to distinguish collective bargaining agreements from executory contracts in general."

The Third Circuit thus correctly rejected the contention raised by the Petitioners below, and reasserted here, that in enacting Section 365, Congress did nothing more than reenact former Section 313(1). (NLRB's petition at p. 15).

Despite the lack of any indication that Congress intended collective bargaining agreements to be treated differently from other executory contracts, the Third Circuit, in dealing with the novel questions before it, nevertheless recognized that the rights of employees under collective bargaining agreements, sanctioned and promoted by the National Labor Relations Act, deserve special considerations not present in ordinary commercial contracts. A review of its decision reveals that the Third Circuit admirably succeeded in reconciling what it perceived as the "tension" between "the statutory policies underlying Chapter 11" and "our national labor policy, as expressed in the National Labor Relations Act." *In re Bildisco, supra* at p. 74.

Rejecting the proposition that rejection of collective bargaining agreements should be governed by the "business judgment test" which controls rejection of ordinary com-

mercial contracts, the court of appeals fashioned a well-reasoned standard designed to adequately protect the rights of union employees while at the same time insuring that attempts of distressed businesses to rehabilitate themselves under the framework of Chapter 11 will not be rendered futile in virtually every case in which the debtor's financial condition does not permit it to comply with the provisions of a union contract.

Citing with approval the guidelines laid down by the Second Circuit in *Shopmen's Local Union No. 455* v. *Kevin Steel Products, Inc.*, 519 F.2d 698 (2d Cir. 1975) the court of appeals stated in *In re Bildisco, supra,* at p. 79:

> "The usual test for rejection of an executory contract is simply whether rejection would benefit the estate, the 'business judgment' test. See 2 *Collier on Bankruptcy* ¶365.03 (15th ed. 1981). The impact of rejection of a collective bargaining agreement on the rights of workers and the favored status those rights have been accorded by Congress, however, require a more stringent examination of the evidence offered to justify rejection of such a contract. The second circuit in *Kevin Steel,* speaking through Judge Feinberg, accommodated the interests of the workers by holding that rejection of a collective bargaining agreement requires 'thorough scrutiny, and a careful balancing of the equities on both sides.' 519 F.2d at 707 (quoting *In re Overseas National Airways, Inc.*, 238 F. Supp. 359, 361 (E.D.N.Y. 1965)).
>
> We accept this formulation of the appropriate relationship between the competing statutory policies. It accommodates the statutory policies of the Labor Act by demanding a greater evidentiary showing than for rejection of a typical executory con-

> tract, but it does not erect impossible barriers to rejection of labor contracts in violation of the policies underlying Chapter 11. It plots a middle course between the possible extremes, requiring a sensitive weighing of the competing private and public interests in the context of the particular case."

As the court of appeals determined, the question of whether a debtor in possession should be permitted to reject a particular executory contract must be decided on a case by case basis utilizing the "thorough scrutiny" and "balancing the equities" test set forth above. Thus the Third Circuit held at page 80 of its opinion:

> "In the multiplicity of fact situations that will arise, we think our best option is to require the bankruptcy courts to undertake a 'thorough scrutiny, and a careful balancing of the equities on both sides' as set forth in *Kevin Steel.* Each case will present its own complexities. For example, the bankruptcy court must understand that the debtor-in-possession who rejects a collective bargaining agreement remains an employer and is still required by the NLRA to bargain with the representatives of its employees, *Kevin Steel,* 519 F.2d at 704, and that its employees retain their right to strike should negotiations fail, see *In re Ryan Co.,* 83 Lab. Cas. (CCH) ¶10,487 at 17,952 n.2 (D. Conn. 1978). The consequences of a strike on a precarious business therefore must be one factor to be weighed by the bankruptcy court. Moreover, because under §365(g) rejection constitutes a breach of contract, the employees may assert a claim for the value of the benefits lost. The court should consider both the impact of the resulting claim against the debtor and the adequacy of the relief employees might obtain through the claims procedures."

In footnote 12 at page 80 the court elaborated on this statement:

> "Among other factors bankruptcy courts might consider in balancing the equities are, for example, the proportion of the debtor's employees covered by the collective bargaining agreement, how those employees' wages and benefits compare to those of others in the industry, and the good or bad faith of the parties in dealing with the effect of the company's insolvency on its labor obligations. See Note, The Bankruptcy Law's Effect on Collective Bargaining Agreements, 81 Colum. L. Rev. 391, 401."

In formulating the above standard, the Third Circuit eschewed the position being asserted by the Petitioners that rejection of a collective bargaining agreement should only be permitted if a debtor in possession can demonstrate that its compliance with the terms thereof will result in the financial collapse of the debtor. As the court noted this proposed standard suffers from two fatal defects. First, the success of a reorganization may be impossible to determine until very late in the bankruptcy proceedings. Secondly, the imposition of such a stringent test "unduly exalts the perpetuation of the collective bargaining agreement over the more pragmatic consideration of whether the employees will continue to have jobs at all." *In re Bildisco, supra* at page 80.

In addition to this cogent analysis it is suggested that elevating the interests of union employees to the preferred status advanced by petitioners, to the point of not permitting the modification of their financial interests without a showing that to do so would render a reorganization impossible, is directly contrary to the concept of equality in the treatment of creditors, one of the primary tenets of this nation's bankruptcy laws. See, *Young* v. *Higbee*

Co., 324 U.S. 204, 210, 65 S. Ct. 594, 597 (1945). In the absence of any indication that Congress intended to afford union employees such a substantially preferred status, the position advanced by petitioners should not be countenanced.

There can also be little doubt that the Petitioners substantially exaggerate the hardship to union employees which can be expected to result from application of the principles laid down by the court of appeals. As the Third Circuit itself noted, a debtor in possession who rejects a collective bargaining agreement is still an employer required by the National Labor Relations Act to bargain with its employees, *In re Bildisco, supra* at page 80. A debtor in possession, moreover, can logically be expected to seek an accommodation with the employees' representatives in the bargaining process, given the crippling effect of a strike on its already distressed financial condition.

It must also be noted that union employees affected by rejection of their union contract are protected by the right to file claims in the reorganization proceeding for monetary losses sustained as a result of rejection. In this regard, union members are in a far better position under the new Bankruptcy Code then they were under the former Bankrupcty Act. As explained at 2 *Collier on Bankruptcy*, ¶365.03, p. 365-17 (15th ed.).

> "Under Section 57d of the [former Bankruptcy] Act the claim of the employees arising from the breach caused by the rejection might not have been allowable on the grounds that it was too speculative to be capable of estimation. Now, under Section 502(c) of the Code such claims must be estimated."

In addition to undercutting the assertions of undue hardship raised by Petitioners, this difference between the for-

mer Bankruptcy Act and the new Code lends further emphasis to the fact that the decision of the Second Circuit in *BRAC* v. *REA Express, supra* does not conflict with the opinion of the Third Circuit below, since the two cases were decided under different statutory frameworks.

II

The opinion of the court of appeals correctly determined that a debtor in possession is not a party to a collective bargaining agreement entered into by the debtor and is not obligated to bargain for mid-term contract modifications pursuant to 29 U.S.C. §158(d).

Petitioners also assert that it was error for the court of appeals to hold tht the debtor in possession was not bound by the provisions of the collective bargaining agreement pending assumption or rejection. Specifically it is asserted that the debtor in possession is prohibited by Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. §158(a)(5), from changing the terms and conditions of employment in the interim period between the filing of the Chapter 11 Petition and the entry of an order either rejecting or adopting a collective bargaining agreement.

The position asserted by Petitioner is so contrary to well-established principles relating to executory contracts in general and collective bargaining agreements in particular that it cannot be seriously argued that the Third Circuit was in error on this point.

It has long been settled that title to a bankrupt's executory contracts does not vest in a trustee or debtor in possession upon the filing of a bankruptcy petition.

Rather, such title vests only upon the affirmative act of adoption. See 2 *Collier on Bankruptcy*, ¶365.01[1], p. 365-8 (15th ed.). As explained by *Collier*:

> "The rationalization for this was that executory contracts and leases involved future liabilities as well as rights, and the estate should not be charged with these except when they were clearly assumed upon due deliberation." 2 *Collier on Bankruptcy,* ¶365.01 [1], p. 365-8 (15th ed.).

Thus, in the context of executory leases a trustee or debtor in possession is not obligated, prior to adoption, to pay the rent reserved in the lease, but only the reasonable value of the use and occupancy of the premises. *Philadelphia Coal Co.* v. *Dipple,* 312 U.S. 168, 174, 61 S. Ct. 538, 540 (1941), 2 *Collier on Bankruptcy,* ¶365.03[2], p. 365-24 (15th ed.).

In the specific context of labor agreements this concept has been recognized by the courts of appeal for the Second and Ninth Circuits. In *Shopmens Local Union No. 455* v. *Kevin Steel Products, Inc., supra* at p. 704 the Second Circuit held that a debtor in possession or trustee in a bankruptcy proceeding is not the same entity as the pre-bankruptcy company. Rather, upon the filing of a bankruptcy petition a new entity is created with its own rights and duties. The Court, therefore, reasoned that until a debtor assumes a pre-existing labor agreement, it is not a "party" to the labor agreement with the union and is not subject to the termination restrictions of Section 8(d) of the National Labor Relations Act.

In *BRAC* v. *REA Express, Inc., supra* at p. 170, 171, the Second Circuit, drawing upon its holding in *Kevin Steel,* rejected the identical contention here being asserted by petitioners. In that case, the court reiterated the doctrine that a debtor in possession is a new entity, not bound by a pre-bankruptcy collective bargaining agreement. The court then analogized the debtor in possession to a successor employer, citing this Court's holding in *N.L.R.B.* v.

Burns Security Services, 406 U.S. 272, 92 S. Ct. 1571 (1972) for the proposition that a successor-employer has the right to unilaterally set the initial terms on which it will hire its employees, in order not to frustrate efforts to revive or expand business entities in poor financial health. The Second Circuit then noted:

> "These principles are particularly applicable to the efforts of a trustee or debtor-in-possession to save a carrier from complete collapse and liquidation. Unless the debtor-in-possession is permitted to act promptly, albeit, unilaterally, in avoiding onerous employment terms that will prevent it from continuing as a going concern, the enterprise, and with it the employment of its workers, may fail. Although a solvent employer might be able to survive continuation of the status quo pending the protracted negotiations, including arbitration and mediation as provided for by §6 of the RLA, a trustee or debtor-in-possession in charge of a carrier teetering on the brink of disaster would, if saddled by onerous executory terms of its predecessor's agreements, not be able to continue in business that long."

As the above reference makes clear, the petitioners find themselves in the unenviable position of asking this Court to review a decision squarely on point with one of the central holdings of the very case they assert creates a conflict among the circuit courts of appeal.

The Ninth Circuit has similarly ruled that a debtor in possession is not bound by the provisions of a collective bargaining agreement prior to its adoption. See *Local Joint Executive Board AFL-CIO* v. *Hotel Circle, Inc.,* 613 F.2d 210, 213-214 (9th Cir. 1980).

Any conceivable question as to a debtor in possession's obligation to comply with the terms of an executory contract prior to assumption has been dispelled by the specific terms of the Bankruptcy Code itself. As pointed out by the Third Circuit in *In re Bildisco, supra,* at p. 84, Section 365(g)(1) the Bankruptcy Code, 11 U.S.C. §365(g)(i) clearly provides that rejection of an executory contract relates back to the date of the filing of a Chapter 11 Petition. This Section provides:

> "Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease—
>
> > (1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, or 13 of this title, immediately before the date of the filing of the petition;"

It is eminently clear from the above stated principles that the court below did not err in not requiring Respondent to bargain with the union prior to making unilateral changes in terms of employment or moving to reject the collective bargaining agreement. On the contrary, the Third Circuit's determination that a debtor in possession is a new entity and as such not a party to the labor agreement was consistent with long standing precedents and the express provisions of the Bankruptcy Code. No reasons exist, therefore, for this Court to grant a Writ of Certiorari.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that none of the considerations governing review on Writ of Certiorari are present in the instant case and that this case should not be reviewed by this Court.

Respectfully submitted,

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Nos. 82-818 and 82-852

In the Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION, ET AL.

LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ETC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether a bankruptcy court, in reorganization proceedings under Chapter 11 of the Bankruptcy Code, 11 U.S.C. (Supp. V) 1101 *et seq.*, may authorize a debtor-in-possession to reject a collective bargaining agreement without a threshold showing that the business is likely to fail unless the agreement is rejected.

2. Whether a debtor-in-possession must comply with the bargaining requirements for midterm contract modification contained in Section 8(d) of the National Labor Relations Act, 29 U.S.C. 158(d), before obtaining authorization to reject a collective bargaining agreement from a bankruptcy court.

3. Whether the National Labor Relations Board may properly find that a debtor-in-possession violates Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), by unilaterally changing the terms of a collective bargaining agreement during the period between filing of a Chapter 11 petition and entry of a court order authorizing rejection of the agreement.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a)[1] is reported at 682 F.2d 72. The decision and order of the National Labor Relations Board (Pet. App. 29a-43a) is reported at 255 N.L.R.B. 1203. The oral opinions of the district court (Pet. App. 44a-48a) and the bankruptcy court (J.A. 56-77) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 27a-28a) was entered on June 17, 1982. Pursuant to orders entered by Justice Brennan on September 3, 1982, and October 5, 1982, the time for filing a petition for a writ of certiorari was extended to and including November 14, 1982. The petitions were timely filed and were granted on January 17, 1983 (J.A. 116-117). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the National Labor Relations Act ("NLRA"), 29 U.S.C. (& Supp. V) 152, provides in pertinent part:

When used in this subchapter—

> (1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under title 11, or receivers.

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 82-818; "J.A." refers to the joint appendix prepared for Nos. 82-818 and 82-852 pursuant to Rule 30.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly * * *.

Section 8 of the National Labor Relations Act, 29 U.S.C. 158, provides in pertinent part:

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7];

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees * * *.

* * * * *

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) * * * shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. * * *

Section 365 of the Bankruptcy Code, 11 U.S.C. (Supp. V) 365, provides in pertinent part:

> (a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.
>
> * * * * *
>
> (g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease—
>
> > (1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, or 13 of this title, immediately before the date of the filing of the petition * * *.

STATEMENT

1. Bildisco is a New Jersey partnership that sells and distributes building supply materials. Some of its employees are represented by Local 408, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("the Union"). The most recent collective bargaining agreement between Bildisco and the Union was effective from May 1, 1979, through April 30, 1982 (Pet. App. 35a). Beginning in January 1980, Bildisco failed to meet certain obligations under the agreement, including payment of pension, health, and welfare contributions, payment of vacation benefits, and remittance to the Union of dues withheld from employees' pay. Beginning in May 1980, it refused to grant wage in-

creases provided for in the agreement (*ibid.*). On April 14, 1980, Bildisco filed a petition for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. (Supp. V) 1101 *et seq.* (Pet. App. 2a; J.A. 40-54). After that date Bildisco operated its business as debtor-in-possession (Pet. App. 2a). During the summer the Union filed unfair labor practice charges with the National Labor Relations Board, and on July 31, 1980, the Board's General Counsel issued a complaint alleging that Bildisco had violated Section 8(a)(5) and 8(a)(1) of the National Labor Relations Act ("NLRA"), 29 U.S.C. 158(a)(5) and (a)(1), by unilaterally changing the terms of the collective bargaining agreement (Pet. App. 4a-5a; J.A. 3-7).

In December 1980, Bildisco filed a motion with the bankruptcy court requesting permission to reject the collective bargaining agreement with the Union (J.A. 55). At the hearing on Bildisco's motion on January 5, 1981, the only witness was Sal Valente, a general partner of Bildisco. Valente testified that Bildisco's creditors were very concerned about the "union situation" at Bildisco and that if Bildisco could operate "non-union" it could save around $100,000 in wages and fringe benefits in 1981 (Pet. App. 3a; J.A. 59-61).[2] According to Valente, this projected savings would make "a considerable difference in [Bildisco's] potential profit for 1981" (Pet. App. 30a; J.A. 60).[3]

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[2] The cost savings that Valente projected were based on the assumption of 10 employees in bargaining unit positions, although at the time of the hearing Bildisco was operating with only three employees in such positions (Pet. App. 3a & n.2; J.A. 61-62, 63).

[3] Valente's testimony that Bildisco's projected profit was $100,000 was unsupported by any evidence. The bankruptcy

On January 15, 1981, the bankruptcy court issued an order granting Bildisco's motion to reject the agreement (Pet. App. 50a). The Union was given 30 days to file a claim for damages resulting from the rejection (Pet. App. 50a; J.A. 77). The district court upheld the bankruptcy court's order (Pet. App. 44a-49a).

2. During the same period the Board was processing the unfair labor practice complaint against Bildisco. Despite repeated warnings from Board staff, Bildisco failed to file an answer to the complaint. On April 23, 1981, the Board granted the General Counsel's motion for summary judgment against Bildisco. The Board concluded that, since Bildisco had not shown good cause for failing to file a timely answer,[4] the allegations in the complaint should be deemed admitted (Pet. App. 30a-33a, 41a). The Board found that Bildisco, as a debtor-in-possession in reorganization proceedings, was an alter ego of the pre-bankrupt company and an "employer" within the meaning of the NLRA, and that it had violated Section 8(a)(5) and (a)(1) of the Act by unilaterally changing the terms of the collective bargaining agreement (Pet. App. 33a-35a). The Board ordered Bildisco, *inter alia*, to cease and desist from refusing to bargain with the Union and to make the various payments and re-

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court sustained an objection to counsel's conclusion that this projection meant that the savings incurred by rejection would make "a difference between a profit and loss," and that line of questioning was not pursued further (J.A. 60-61).

[4] The complaint against Bildisco was issued on July 31, 1980; an amended complaint was filed on October 8, 1980 (J.A. 3-13). Under the Board's rules, 29 C.F.R. 102.20, an answer is due within 10 days of service of a complaint. Bildisco finally filed an answer on May 20, 1981, almost a month after the Board had issued its decision and order (J.A. 35-37).

mittance of dues required by the agreement (*id.* at 38a-41a).

3. The Union's appeal from the district court's order affirming the bankruptcy court's approval of rejection and the Board's application for enforcement of its order were consolidated in the court of appeals (Pet. App. 6a-7a).[5]

a. The court of appeals held first that a collective bargaining agreement is an executory contract within the meaning of Section 365(a) of the Bankruptcy Code, 11 U.S.C. (Supp. V) 365(a), and thus is subject to rejection by a debtor-in-possession (Pet. App. 10a-11a). The court also concluded that a debtor-in-possession is not bound by the restrictions on mid-term contract modification contained in Section 8(d) of the NLRA, 29 U.S.C. 158(d) (Pet. App. 12a, 21a-22a). However, the court recognized that the usual test for rejection of executory contracts, *i.e.*, whether rejection would benefit the estate (the "business judgment" test), should not be applied, since the "impact of rejection of a collective bargaining agreement on the rights of workers and the favored status those rights have been accorded by Congress * * * require a more stringent examination of the evidence offered to justify rejection of such a contract" (*id.* at 12a). The court accepted the conclusion of the Second Circuit in *Shopmen's Local Union No. 455* v. *Kevin Steel Products, Inc.*, 519 F.2d 698, 707 (1975) (quoting *In re Overseas National Airways, Inc.*, 238 F. Supp. 359, 361 (E.D.N.Y. 1965)), that, in light of the competing statutory policies, rejection of a collective bargaining agreement requires " 'thorough scrutiny, and

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[5] The Board intervened in the Union's appeal, and the Union intervened in the Board's application for enforcement.

a careful balancing of the equities on both sides' " (Pet. App. 12a-13a).

However, the court declined to accept the Second Circuit's subsequent ruling in *Brotherhood of Railway Employees* v. *REA Express, Inc.*, 523 F.2d 164, 172, cert. denied, 423 U.S. 1017 (1975), that in order to accommodate the policy underlying the national labor laws, rejection of a collective bargaining agreement should be permitted only in cases in which it could be shown that the company would collapse and the employees would lose their jobs unless the agreement was rejected. The court declined to follow this "more stringent test" because it believed that it might be impossible to predict the success of a reorganization until very late in the proceedings and that the test unduly exalted perpetuation of the agreement over "the more pragmatic consideration of whether the employees will continue to have jobs at all" (Pet. App. 14a-15a). The court instead fashioned its own standard, under which the debtor-in-possession must first demonstrate that continuation of the collective bargaining agreement would be burdensome to the estate and the bankruptcy court must then weigh the competing equities, with particular attention to doing equity between claims arising under the agreement and other claims against the debtor (*id.* at 17a). The court vacated the district court judgment and remanded for reconsideration in light of the test it had articulated (*id.* at 20a).

b. The court of appeals refused to enforce the Board's order. It concluded that the Board's finding that Bildisco had violated Section 8(a)(5) and (a)(1) of the NLRA was premised on the view that the debtor-in-possession is an alter ego of the debtor and thus a party to the collective bargaining agreement (Pet. App. 21a). The court rejected that prem-

ise, citing the conclusion of the Second Circuit in *Kevin Steel*, *supra*, 519 F.2d at 704, that the debtor-in-possession is a " 'new entity * * * created with its own rights and duties, subject to the supervision of the bankruptcy court' " (Pet. App. 21a-22a).

The court further concluded that rejection of the agreement related back to the day before the Chapter 11 petition was filed, citing 11 U.S.C. (Supp. V) 365(g)(1), and that this meant that in effect no labor contract existed between the union and the debtor-in-possession subsequent to April 14, 1980 (Pet. App. 24a-25a). The court stated that the rejection did not affect obligations that had arisen prior to the date of the petition, so that the Board would not be precluded from finding an unfair labor practice and imposing monetary relief based on Bildisco's pre-petition conduct (*id.* at 25a-26a). The court remanded so that the Board could separate pre-petition conduct from post-petition conduct. The court stated that if on remand the bankruptcy court again permitted rejection of the collective bargaining agreement the Board would be bound by that determination and thus precluded from finding any unfair labor practice based on failure to meet obligations under the agreement in the post-petition period (*ibid.*).

SUMMARY OF ARGUMENT

This case involves rejection of a collective bargaining agreement by a debtor-in-possession in a bankruptcy proceeding—a situation that involves the competing policies of the labor laws and the bankruptcy laws. The standard for rejection established by the court below does not constitute an adequate accommodation of the two competing statutory policies, since it seriously undermines the collective bargain-

ing and employee interests protected by the national labor policy. In addition, the court below erred in restricting the Board's ability to remedy unfair labor practices committed by a debtor-in-possession in the period between filing of a bankruptcy petition and court approval of rejection of a collective bargaining agreement.

1. a. Under Section 8(d) of the National Labor Relations Act, 29 U.S.C. 158(d), a party to a collective bargaining agreement violates the Act if it attempts to terminate or modify the agreement in midterm without the consent of the other party and without following specified procedures. However, Section 365(a) of the Bankruptcy Code, 11 U.S.C. (Supp. V) 365(a), provides that a debtor-in-possession may reject executory contracts following approval by the bankruptcy court. Collective bargaining agreements are not expressly excluded from the class of executory contracts that may be rejected. In view of this direct conflict between the terms of the labor laws and the bankruptcy laws, the two statutes should be interpreted in a manner that will give maximum possible effect to each. In particular, the accommodation must give meaningful effect to the important concerns of the national labor policy.

b. A proper accommodation of the labor laws and the bankruptcy laws requires that bankruptcy courts apply a stringent standard in determining whether to approve rejection of a collective bargaining agreement. Such a standard is necessary to minimize the impairment of collective bargaining and employee interests protected by the NLRA. Unlike commercial creditors, who generally spread risk among numerous

customers, employees normally are wholly dependent upon their employer for wages and benefits. And, as this Court has recognized, a collective bargaining agreement is different from an ordinary commercial contract, since it governs an entire employment relationship. Rejection of such an agreement leaves the parties without a code of industrial government; in addition, it deprives employees of not only monetary rights, but also important nonmonetary rights for which money damages cannot compensate. Moreover, rejection interferes with the right of the parties to regulate the substantive terms of the employment relationship.

These considerations led the Second Circuit to conclude that it is improper to permit rejection of a collective bargaining agreement merely because rejection would improve the financial status of the debtor. The Second Circuit found that the policies underlying the national labor laws require that a court decline to approve rejection of a collective bargaining agreement unless the debtor can show that absent rejection the company will fail and the employees will lose their jobs and unless a balancing of the equities favors rejection. *Shopmen's Local Union No. 455* v. *Kevin Steel Products, Inc.*, 519 F.2d 698 (1975); *Brotherhood of Railway Employees* v. *REA Express, Inc.*, 523 F.2d 164, cert. denied, 423 U.S. 1017 (1975). The Second Circuit standard ensures that collective bargaining agreements are rejected only when necessary to accomplish the bankruptcy policy goal of avoiding collapse of the business, not simply because an employer prefers to operate without the restrictions of the collective bargaining agreement. The Second Circuit standard has been accepted and applied by a number of bankruptcy

and district courts. Congress' reenactment of the provision allowing rejection of executory contracts without substantial change in the 1978 Bankruptcy Code reflects an intent to codify the consistent judicial interpretation. See *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978).

The court below erred in rejecting the Second Circuit's threshold requirement that a debtor-in-possession demonstrate that the business is likely to fail absent rejection of a collective bargaining agreement and in fashioning a test that permits ready rejection of collective bargaining agreements. The court's test operates to undermine the national labor policy of encouragement of collective bargaining and protection of employee interests. The Eleventh Circuit similarly erred in its recent rejection of the Second Circuit's threshold requirement. *In re Brada Miller Freight System, Inc.*, No. 82-7043 (11th Cir. Apr. 11, 1983), slip op. 2360-2361. The factors the court in *Brada Miller* believed a bankruptcy court should consider are consistent with the balancing of equities that occurs under the Second Circuit's *Kevin Steel-REA Express* standard. However, because the Eleventh Circuit would omit the threshold requirement of a showing of likely failure absent rejection, it accords insufficient weight to the national labor policy.

c. Both the Second Circuit and the court below have suggested that at least some of the requirements of the labor laws can be ignored in the context of bankruptcy proceedings because, in the view of those courts, the debtor-in-possession is a "new entity," different from the debtor and analogous to a successor employer. The "new entity" characterization is unsound because it is internally contradictory; if the debtor-in-possession really is a new

entity, there would be no need for it to obtain rejection of any contract because it could never be bound by the debtor's obligations. The successorship analogy also is unsatisfactory, because the debtor-in-possession actually operates the same business on behalf of the debtor and is not truly distinct from its former self. The situation of the debtor-in-possession is markedly different from that of a true successor employer, which normally has not agreed to assume the collective bargaining agreement.

2. The Union, petitioner in No. 82-852, contends (82-852 Pet. 7-23) that, as a precondition to obtaining rejection of a collective bargaining agreement, the debtor-in-possession must show that it has complied with the bargaining requirements for midterm contract modification contained in Section 8(d) of the NLRA. We believe that a proper accommodation of the labor laws and the bankruptcy laws does not require adherence to Section 8(d) procedures in the context of a bankruptcy proceeding because the resulting delay would be inconsistent with the need for expeditious determination of the need for rejection. However, it is entirely appropriate for the bankruptcy court to encourage the parties to bargain prior to approval of rejection. The union party can be expected to agree to modifications that are necessary to preservation of the business (and thus preservation of jobs). Such a solution, which could avoid loss of important employee rights that do not impair the employer's economic viability, as well as loss of employer rights under the agreement, is far more consistent with the national labor policy than total rejection pursuant to the Bankruptcy Code.

3. The court below erred in concluding that the Board would be precluded from finding that re-

spondent Bildisco committed unfair labor practices in violation of Section 8(a)(5) of the NLRA, 29 U.S.C. 158(a)(5), by unilaterally changing the terms of the collective bargaining agreement between the dates of filing of the bankruptcy petition and entry of a court order authorizing rejection of the agreement. The court based its conclusion in part on the erroneous view that the debtor-in-possession is a new entity. The court also asserted that rejection of the collective bargaining agreement has a retroactive effect under the terms of 11 U.S.C. (Supp. V) 365(g)(1), which provides that rejection of an executory contract constitutes a breach of the contract as of the date immediately before filing of the petition. However, the legislative history makes clear that the provision cited refers only to the priority of claims for damages based on rejection of the contract, not to the existence of the contract in the post-petition period. Deeming the rejection of a collective bargaining agreement to be retroactive to a date prior to filing of the petition for purposes of determining unfair labor practice liability, which amounts to permitting unilateral action taken prior to the court approval required by the bankruptcy laws, is unnecessary to furtherance of the policies of the bankruptcy laws. In addition, retroactive nullification of a collective bargaining agreement impairs employee interests that are protected by the NLRA, since employees lose benefits for a period during which they believed themselves contractually entitled to receive them. Finally, retroactive nullification seriously impairs the Board's unique ability to protect employees' and employers' collective bargaining rights during reorganization proceedings by issuing orders directed at unfair labor practices committed during this period.

ARGUMENT

I. A PROPER ACCOMMODATION OF THE POLICIES OF THE LABOR LAW AND BANKRUPTCY LAWS REQUIRES THAT A BANKRUPTCY COURT NOT AUTHORIZE REJECTION OF A COLLECTIVE BARGAINING AGREEMENT UNLESS THE DEBTOR-IN-POSSESSION CAN MAKE A THRESHOLD SHOWING THAT THE BUSINESS IS LIKELY TO FAIL ABSENT REJECTION

A. The Competing Policies of the National Labor Relations Act and the Bankruptcy Code Require an Accommodation That Gives Meaningful Effect to the National Labor Policy

As the court below recognized (Pet. App. 7a), rejection of a collective bargaining agreement in a bankruptcy proceeding "implicates a significant confrontation of labor and bankruptcy policies." Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), makes it an unfair labor practice for an employer, including a trustee in reorganization proceedings,[6] to refuse to bargain collectively with the representative of his employees. Section 8(d) of the Act, 29 U.S.C. 158(d), defines the duty to bargain collectively to mean, *inter alia*, that no party to a collective bargaining agreement shall "terminate or modify" it unless that party follows specified procedures.[7] Section 8(d) further

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[6] Section 2(1) of the NLRA, 29 U.S.C. (Supp. V) 152(1), provides that the term "person" includes "trustees in cases under title 11, or receivers"; Section 2(2), 29 U.S.C. 152(2), provides that the term "employer" includes any person acting as an agent of an employer, directly or indirectly.

[7] The required procedures under Section 8(d) include notice to the other party to the agreement and to the Federal Mediation and Conciliation Service, an offer to negotiate a new

provides that no party can be required either to "discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract."

Accordingly, it is a violation of the NLRA for a party unilaterally to modify or abrogate a collective bargaining agreement. See *Allied Chemical Workers Local Union No. 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 159, 185-186 (1971); *NLRB* v. *Scam Instrument Corp.*, 394 F.2d 884, 887 (7th Cir.), cert. denied, 393 U.S. 980 (1968); *C&S Industries, Inc.*, 158 N.L.R.B. 454, 456-458 (1966).[8] Moreover, violation of the prohibition on unilateral midterm contract modification is not excused by an employer's economic hardship. *Oak Cliff-Golman Baking Co.*, 207 N.L.R.B. 1063, 1064 (1973), enforced, 505 F.2d 1302 (5th Cir. 1974), cert. denied, 423 U.S. 826 (1975); *Airport Limousine Service*, 231 N.L.R.B. 932, 934 (1977); *Phoenix Air Conditioning, Inc.*, 231 N.L.R.B. 341, 342 & n.6 (1977), enforced, 580 F.2d 1053 (9th Cir. 1978). "The Act permits no immunity because the employer may think that the exigencies of the moment require infraction of the statute." *NLRB* v. *Harris*, 200 F.2d 656, 659 (5th Cir. 1953). The statutory procedures for modification or termination of a collective bargaining agree-

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agreement, and continuation of the agreement for a 60-day period following notice of termination or modification, or until the expiration date of the contract, which occurs later.

[8] Even in the absence of an agreement, an employer violates its bargaining obligation under the Act by unilaterally changing existing conditions of employment during the pendency of contract negotiations. *NLRB* v. *Katz*, 369 U.S. 736 (1962).

ment are designed to "facilitate agreement in place of economic warfare." *Allied Chemical Workers Local Union No. 1* v. *Pittsburgh Plate Glass Co.*, *supra*, 404 U.S. at 187.

On the other hand, Section 365(a) of the Bankruptcy Code, 11 U.S.C. (Supp. V) 365(a), provides that a debtor-in-possession may reject executory contracts following approval by the bankruptcy court.[9] This procedure serves an underlying purpose of the bankruptcy laws, since rejection of burdensome obligations may help a company to return to financial viability. Nothing in the Bankruptcy Code or its history expressly excludes collective bargaining agreements from the class of executory contracts that may be rejected by a debtor-in-possession. Indeed, there is some circumstantial evidence that Congress intended to include collective bargaining agreements within that class.[10]

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[9] Section 365(a) provides in pertinent part that "the trustee, subject to the court's approval, may assume or reject any executory contract * * *." Since a debtor-in-possession may exercise the powers of a trustee (see 11 U.S.C. (Supp. V) 1107), it may apply for permission to reject executory contracts. Section 365(a) applies to both reorganization proceedings under Chapter 11 and liquidation proceedings under Chapter 7 of the Bankruptcy Code. 11 U.S.C. (Supp. V) 103(a).

[10] More than three years before the 1978 enactment of the Bankruptcy Code, the Second Circuit held squarely that a collective bargaining agreement could be rejected as an executory contract pursuant to Section 313(1) of the Bankruptcy Act, 11 U.S.C. 713(1). *Shopmen's Local Union No. 455* v. *Kevin Steel Products, Inc.*, 519 F.2d 698, 704-705 (1975); *Brotherhood of Railway Employees* v. *REA Express, Inc.*, 523 F.2d 164, 168-169, cert. denied, 423 U.S. 1017 (1975). Congress did not express disagreement with these decisions when it enacted the Bankruptcy Code. It is a fundamental principle of statutory construction that "Congress is presumed to be aware of an administrative or judicial interpretation of

Thus, there is a direct conflict between Section 8(d) of the NLRA, which bars midterm modification

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a statute and to adopt that interpretation when it * * * adopts a new law incorporating sections of a prior law." *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978). See also *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-698 (1979); *NLRB* v. *Gullett Gin Co.*, 340 U.S. 361, 366 (1951).

In addition, Section 1167 of the Bankruptcy Code, 11 U.S.C. (Supp. V) 1167, which relates to railroad reorganizations, provides:

> Notwithstanding section 365 of this title, neither the court nor the trustee may change the wages or working conditions of employees of the debtor established by a collective bargaining agreement that is subject to the Railway Labor Act (45 U.S.C. 151 et seq.) except in accordance with section 6 of such Act (45 U.S.C. 156).

As the court below observed (Pet. App. 11a), "[Section 1167] * * * permits an inference that, with this one exception, Congress did not intend to distinguish collective bargaining agreements from executory contracts in general." The Bankruptcy Act included a similar provision for railroad reorganizations. See 11 U.S.C. 205(n); *Kevin Steel*, *supra*, 519 F.2d at 702.

Finally, the legislative history of Section 82 of the Bankruptcy Act, Pub. L. No. 94-260, 90 Stat. 316, 11 U.S.C. 402, which permitted rejection of executory contracts of municipalities in Chapter IX proceedings, also supports this inference. In discussing Section 82, the Senate Report states that "all continuing obligations of the petitioner will be considered executory contracts, including collective bargaining agreements." S. Rep. No. 94-458, 94th Cong., 1st Sess. 15 (1975). See also H.R. Rep. No. 94-686, 94th Cong., 1st Sess. 8-9 (1975). The House Report cites *Kevin Steel* and *REA Express* as support for the proposition that a petitioner seeking to reject a collective bargaining agreement must make a greater showing than that necessary for the rejection of an ordinary commercial contract. H.R. Rep. No. 94-686, *supra*, at 17-18. See also 122 Cong. Rec. 7972 (1976). Section 82 was repealed in 1978 by the Bankruptcy Code, but Section 365 of the Code, which provides for the rejection of executory contracts generally, applies to municipal bankruptcies. 11 U.S.C. (Supp. V) 901.

or termination of a collective bargaining agreement without the consent of both parties to the agreement, and Section 365 of the Bankruptcy Code, which empowers a bankruptcy court to permit a debtor-in-possession to reject such an agreement over the opposition of the union party. In such circumstances, the two statutes should be interpreted in a manner that gives the maximum possible effect to both. See *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974); *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939). In particular, the accommodation must give meaningful effect to the important concerns of the national labor policy. Thus, rejection of a collective bargaining agreement in a bankruptcy proceeding should be authorized only pursuant to safeguards designed to afford the maximum possible protection to collective bargaining interests of employees.

B. A Stringent Standard for Rejection of a Collective Bargaining Agreement in a Bankruptcy Proceeding Is Required in Order to Minimize the Impairment of Employee Interests and the Policies of the NLRA That Results From Such Rejection

It is essential that there be a stringent standard for rejection of a collective bargaining agreement in a bankruptcy proceeding in order to give appropriate recognition to the policies of the NLRA. Those policies include encouragement of collective bargaining and protection of employee interests, both of which may be seriously impaired as a result of rejection. The Second Circuit has achieved an accommodation between the labor laws and the bankruptcy laws that gives appropriate recognition to the former by requiring a threshold showing that a business is likely to fail absent rejection. Congress implicitly approved that accommodation when it enacted the Bankruptcy

Code in 1978. The court below, as well as the Eleventh Circuit in a more recent case, erred in rejecting the Second Circuit accommodation, thereby giving inadequate recognition to the significant concerns underlying the national labor policy.

1. In considering the proper standard for rejection of a collective bargaining agreement, it is necessary to consider the special nature of such an agreement. As this Court has recognized, "a collective bargaining agreement is not an ordinary contract." *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 550 (1964). See generally Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601 (1956). Rather, "it is a generalized code to govern * * * the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant." *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-579 (1960) (footnote omitted). Thus, rejection of a collective bargaining agreement leaves the parties—both employer and employees—without a code of industrial government under which to operate, a situation that is not conducive to labor peace.

Moreover, a collective bargaining agreement normally provides employees with many nonmonetary rights, such as seniority rights, pension rights, grievance and arbitration procedures, and no strike/no lockout clauses; these rights, along with any monetary benefits, are wiped out when the agreement is rejected. While the debtor's rejection of a contract constitutes a breach (see 11 U.S.C. (Supp. V) 365(g)) for which money damages may be awarded, such damages are clearly inadequate to compensate employees for loss of nonmonetary rights

contained in a collective bargaining agreement. See *Kevin Steel, supra*, 519 F.2d at 707. Even the monetary terms of the agreement, such as wages and benefits, stand on a different footing from the claims of commercial creditors whose contracts have been rejected. While such creditors generally spread risk among numerous customers, employees normally are wholly dependent on their employer for wages and benefits. Upon a debtor's breach, employees, unlike commercial creditors, may be unable to mitigate their losses by ceasing performance, for it may be impossible for them to obtain other employment. The breach that results from rejection of a collective bargaining agreement allows employees to cease work and strike. See *In re Petrusch*, 667 F.2d 297, 298-300 (2d Cir. 1981), cert. denied, 456 U.S. 974 (1982); *Truck Drivers Local Union No. 807* v. *Bohack Corp.*, 541 F.2d 312, 317-318 (2d Cir. 1976). However, it serves the policies of neither the bankruptcy laws nor the labor laws to structure relations so that employees must strike in order to protect contractual terms of employment.

Finally, it is a basic policy of the NLRA that "the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences." *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477, 488 (1960). Accord: *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99, 108 (1970). When a bankruptcy court permits a debtor to reject a collective bargaining agreement it negotiated with the representative of its employees, it effectively regulates the substantive terms of the employment relationship over the objections of one of the parties. In authorizing rejection of the agreement, the court determines that the terms and conditions of employment

negotiated by the parties are unduly burdensome, and, as a practical matter, sets the course of the future negotiations.[11]

2. Such considerations led the Second Circuit to conclude in *Shopmen's Local Union No. 455* v. *Kevin Steel Products, Inc.*, 519 F.2d 698 (1975), that the decision whether to allow rejection of labor agreements should not be based solely on whether rejection would improve the financial status of the debtor (the usual test for rejection of executory commercial contracts in a bankruptcy proceeding),[12] because such a narrow approach "totally ignores the policies of the Labor Act and makes no attempt to accommodate to them" (*id.* at 707). Rather, a bankruptcy court should permit rejection of a collective bargaining agreement "only after thorough scrutiny, and a careful balancing of the equities on both sides, for, in relieving a debtor from its obligations under

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[11] Although the court of appeals noted (Pet. App. 16a) that the debtor-in-possession remains obligated to bargain with the incumbent union following rejection of a collective bargaining agreement, post-rejection bargaining is no substitute for pre-rejection bargaining. For example, if the debtor-in-possession has obtained rejection of the agreement on the ground that its survival requires wages to be reduced by a certain percentage, as a realistic matter effective bargaining on that matter has been preempted. In recognition of the fact that bargaining before and after an event are very different, the Board, with court approval, generally requires an employer that has violated the NLRA by making a unilateral change in conditions of employment to restore the status quo ante before bargaining with the union. See *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 216 (1964).

[12] The test used to determine whether a bankruptcy trustee may reject an ordinary commercial contract is referred to as the "business judgment" test. 2 *Collier on Bankruptcy* ¶ 365.03, at 365-14 (L. King 15th ed. 1982).

a collective bargaining agreement, it may be depriving the employees affected of their seniority, welfare and pension rights, as well as other valuable benefits which are incapable of forming the basis of a provable claim for money damages" (*ibid.*, quoting *In re Overseas National Airways, Inc.*, 238 F. Supp. 359, 361-362 (E.D.N.Y. 1965)). Approximately a month after its decision in *Kevin Steel*, the Second Circuit, in applying the *Kevin Steel* principles to agreements of non-railroad employees subject to the Railway Labor Act, held that, in view of the serious effects rejection has on employees, it should be permitted "only where it clearly appears to be the lesser of two evils and that, unless the agreement is rejected, the [company] will collapse and the employees will no longer have their jobs." *Brotherhood of Railway Employees* v. *REA Express, Inc.*, 523 F.2d 164, 172 (2d Cir.), cert. denied, 423 U.S. 1017 (1975).

The *Kevin Steel-REA Express* standard ensures that collective bargaining agreements are rejected only when that step is demonstrably necessary to accomplish the bankruptcy policy goal of creating conditions that will forestall collapse of the business, and not merely when those responsible for the reorganization would prefer to operate without the restrictions of the collective bargaining agreement. That standard has been accepted and applied by a number of bankruptcy and district courts.[13] More-

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[13] See, *e.g.*, *In re Miles Machinery*, No. 81-00388 (Bankr. E.D. Mich. June 17, 1982), slip op. 4-5 (rejection disallowed); *In re David A. Rosow, Inc.*, 9 Bankr. 190, 191-193 (Bankr. D.Conn. 1981) (same); *In re Connecticut Celery Co.*, 106 L.R.R.M. (BNA) 2847, 2851-2853 (Bankr. D. Conn. 1980) (same); *In re Studio Eight Lighting, Inc.*, 91 L.R.R.M. (BNA) 2429, 2430 (E.D.N.Y. 1976) (same). Compare *In re*

over, it is the standard Congress has implicitly approved. There can be no doubt that Congress was aware of the Second Circuit standard at the time it enacted the new Bankruptcy Code in 1978, since it had referred to it as an established standard—citing both *Kevin Steel* and *REA Express*—when it amended the Bankruptcy Act several years before. See H.R. Rep. No. 94-686, 94th Cong., 1st Sess. 17-18 (1975); page 19 note 10, *supra*. See also *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978). Congress' reenactment of the provision permitting rejection of executory contracts without significant change indicates an intent to codify the consistent judicial interpretation. *Lorillard* v. *Pons*, *supra*, 434 U.S. at 580; *NLRB* v. *Gullett Gin Co.*, 340 U.S. 361, 366 (1951). Thus, Congress has approved the accommodation of the labor laws and the bankruptcy laws that is reflected in the Second Circuit's requirement of a threshold showing that the business is likely to fail unless the collective bargaining agreement is re-

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Brada Miller Freight System, Inc., 16 Bankr. 1002 (N.D. Ala. 1981), vacated and remanded, No. 82-7043 (11th Cir. Apr. 11, 1983) (rejection allowed); *In re Allied Technology, Inc.*, 8 Bankr. 366 (Bankr. S.D. Ohio 1980) (rejection allowed when business had ceased operating and generating revenue); *In re Alan Wood Steel Co.*, 449 F. Supp. 165, 169-170 (E.D. Pa. 1978) (same); *In re Penn Fruit Co.*, 92 L.R.R.M. (BNA) 3548 (E.D. Pa. 1976) (rejection allowed where no possibility existed of saving jobs of employees). Until the decision below, no court of appeals other than the Second Circuit had specifically addressed the proper standard for rejection of a labor contract. Cf. *Local Joint Executive Board* v. *Hotel Circle, Inc.*, 613 F.2d 210, 213-214 n.2 (9th Cir. 1980) (finding it unnecessary to address the question whether the bankruptcy court "should apply a stricter standard for authorizing the rejection of collective bargaining agreements as a means of reconciling the policies of the labor and bankruptcy laws").

jected. The court below accordingly erred in rejecting (Pet. App. 13a-14a) the aspect of the congressionally approved Second Circuit standard articulated in *REA Express*.

The requirement of a threshold showing that the business is likely to fail absent rejection is of considerable importance in giving effect to the national labor policy, since it ensures that rejection will occur only for reasons of real economic necessity.[14] Moreover such a requirement enables employers, unions, and employees to predict with greater certainty whether a collective bargaining agreement is likely to be rejected by a bankruptcy court, and thus lessens the amount of litigation on this question. Cf. *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 679 (1981).

The reasons offered by the court below for rejecting the aspect of the Second Circuit standard articulated in *REA Express* do not withstand scrutiny. The court observed first that it may be impossible to predict the success of a reorganization until late in the proceedings (Pet. App. 14a). This criticism misses the point; until it *is* apparent that the business is likely to fail unless the collective bargaining agreement is rejected, a proper accommodation of the policies underlying the labor laws requires that the terms previously bargained for remain in effect. The court also expressed concern that the *Kevin Steel-REA Express* standard "would make it likely

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[14] A bankruptcy court, being unfamiliar with labor law principles and policies and accustomed to focusing only on furthering the policies of the bankruptcy laws, might otherwise tend to authorize rejection of a collective bargaining agreement on a mere showing that it would improve the financial condition of the debtor. See pages 27-28 note 15, *infra*.

that numerous businesses attempting to reorganize will in fact be forced over the line into liquidation" (Pet. App. 15a). The court cites no examples of such an occurrence, and its concern appears to be groundless. If at any point during the reorganization proceedings a debtor-in-possession can show that it is likely to be forced into liquidation, it can then seek rejection of the collective bargaining agreement.

The test adopted by the court below would permit collective bargaining agreements to be rejected far too readily. Under that test, the debtor-in-possession first must show that an agreement is burdensome to the estate; the bankruptcy court then must balance the equities between the employees and the creditors and make a reasoned determination that rejection of the agreement will assist the debtor-in-possession to achieve a satisfactory reorganization (Pet. App. 17a). Under this standard, it appears likely that most collective bargaining agreements could be rejected.[15] Presumably most debtors-in-possession could

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[15] One bankruptcy court that rejected the *REA Express* aspect of the Second Circuit standard and applied the standard adopted by the court below allowed rejection of a collective bargaining agreement despite the fact that there was no contention or evidence that the economic terms of the contract were "too costly to be sustained by the debtor" or that they had contributed to the bankruptcy. The bankruptcy court permitted rejection because the president of the debtor-in-possession, who asserted that a "union free environment is best for my style of management," wanted to be able to escape the seniority provisions of the contract and thus allegedly improve production. The debtor-in-possession had never established objective production criteria, and it did not provide evidence of individual production performance to either the union or the bankruptcy court. Despite the union's acknowledged willingness to bargain about production problems, the court found that use of the contractual grievance procedures to re-

establish that a labor contract imposes some burdens on the estate and deprives it of assets that could be used for other purposes. Under the balancing of equities prescribed by the court below, no special weight is given to collective bargaining interests; instead, interests of creditors are weighed equally with interests of employees.[16] Presumably a court could always conclude that, since creditors must compromise during reorganization, employees, too, should sacrifice. Moreover, rejection of contractual obligations to employees presumably could be said to assist in achieving a satisfactory reorganization in many cases. Such a standard gives insufficient weight to

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solve contentions that particular employees were unproductive would be "burdensome." The court concluded that rejection was proper on the ground that the president of the debtor-in-possession had insisted on making his earlier purchase of the capital stock of the company conditional on rejection of the collective bargaining agreement. *In re Southern Electronics Co.*, 23 Bankr. 348, 359, 361-363 (Bankr. E.D. Tenn. 1982).

[16] The court of appeals indicated (Pet. App. 16a) that one factor to be weighed in a balancing of the equities is the fact that employees could file a claim against the estate for damages resulting from rejection of a collective bargaining agreement. Such a claim would provide no compensation for loss of the numerous nonmonetary rights to which employees are entitled under most collective bargaining agreements. See pages 21-22, *supra*. For example, the agreement in this case included provisions relating to duties of employees, seniority, arbitration of disputes, leave, vacations, and many other aspects of the employer-employee relationship (see J.A. 82-83, 83-85, 92-94, 88-89, 108-111). In addition, recovery of monetary claims is an uncertain proposition, since claims based on rejection are classified as pre-petition claims (see 11 U.S.C. (Supp. V) 365(g)(1)) and are thus part of the class of general unsecured claims. Hence, employees may have little chance of recovering compensation for their lost contractual rights.

the special status of collective bargaining agreements under the NLRA and to the hardships imposed on employees as a result of rejection.

The test adopted by the court below also gives insufficient consideration to Congress' decision that the relationship between labor and management should be resolved through the collective bargaining process. The court below made no reference to the possibility that the bankruptcy court, before entertaining a petition to reject the existing agreement, could require the debtor-in-possession to attempt to reach a new agreement with the union that would preserve rights of employees to the maximum extent possible, while easing some of the financial pressure on the estate.[17] Instead, the court's test allows the bankruptcy court

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[17] Although in some circumstances it may be important for an employer to act quickly in changing the terms under which it operates, its bargaining obligation under the NLRA requires it only to bargain until a genuine impasse exists. In circumstances in which the employer claims a need to change particular terms because of severe financial hardship, the bargaining could well be quite abbreviated. See *Shell Oil Co.*, 149 N.L.R.B. 305, 307 (1964), in which the Board found that a two-day notice and offer to bargain about a proposed transfer of part of an operation in order to realize an economic saving met the employer's bargaining obligation. The Board explained that the amount of time and discussion required to meet the obligation to bargain in good faith may vary with, *inter alia*, "the exigencies of the particular business situation involved." *Ibid.*

One court has suggested that there should be a threshold requirement that the debtor-in-possession attempt to renegotiate the collective bargaining agreement before a rejection application may be made to the bankruptcy court. *In re Price Chopper Supermarkets, Inc.*, 19 Bankr. 462, 466 (Bankr. S.D. Cal. 1982). See also *In re Brada Miller Freight System, Inc.*, *supra*, slip op. 2362 (suggesting that bankruptcy courts could require such bargaining); Note, *The Labor-Bankruptcy Con-*

to usurp the parties' roles in the collective bargaining process and to decide for itself such questions as whether "it would be in the interests of the workers in a bargaining unit to be afforded the opportunity to continue to work under less generous financial benefits [rather] than to insist upon an absolute payment of vacation benefits, pension, health and welfare benefits, and wage increases" (Pet. App. 18a n.13); and whether the employees are likely to strike if the contract is rejected (*id.* at 16a).[18] Of course, these normally are matters that are best worked out by the parties themselves; given the mutual interest of employer and employees in preservation of the business, it would be unusual for employees to insist on continuation of particular terms if the debtor-in-possession could demonstrate during negotiations that adherence to those terms would cause the business to fail.

3. In *In re Brada Miller Freight System, Inc.*, *supra*, the Eleventh Circuit joined the court below in rejecting the *Kevin Steel-REA Express* test insofar as it requires a threshold showing by the debtor-in-possession that the business is likely to fail

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flict: Rejection of a Debtor's Collective Bargaining Agreement, 80 Mich. L. Rev. 134, 148-152 (1981). The record in this case suggests that the debtor-in-possession made no attempt whatsover to renegotiate the collective bargaining agreement it sought to reject.

[18] The practice of bankruptcy judges of participating in the affairs of the debtor's estate, including negotiation of contracts, was one of the problems Congress sought to avoid in the Bankruptcy Code. See H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 88-91 (1977). The standard for rejection established by the court below defeats this congressional purpose by needlessly injecting bankruptcy judges into the arena of collective bargaining.

absent rejection of the collective bargaining agreement. The court believed that "[t]o elevate this single consideration to such a dominant and decisive position allows the issue of rejection to be settled without any consideration of the interests of other parties involved, a total abdication of the policies behind the bankruptcy laws" (*Brada Miller, supra,* slip. op. 2360-2361; footnote omitted). However, while the Eleventh Circuit purports to agree with the court below that a "balancing of the equities test provides a more satisfactory accommodation of the conflicting interests at stake in a rejection proceeding" (*id.* at 2360), it acknowledges that "in many instances, the threat of liquidation with its incumbent loss of jobs and default on debts will properly constitute the principal factor in a judge's decision to allow rejection" (*id.* at 2361 n.26).

The factors the *Brada Miller* court cites as relevant to the rejection decision appear to be compatible with the *Kevin Steel-REA Express* standard in most respects. Thus, whether the employer sought "concessions from the unions prior to its attempt to reject the contract" and, if so, "how cooperative was the union" (*Brada Miller, supra,* slip op. 2362) would be relevant to the determination whether the business is likely to fail absent rejection of the collective bargaining agreement. This is because the bankruptcy court is in a better position to decide whether the agreement in fact threatens the survival of the business if it knows the employer's position on which provisions require modification and in what respects, and the union's counterproposals. In addition, when the employer asks the bankruptcy court to authorize rejection of a collective bargaining agreement without first attempting to bargain with

the union over the modifications the employer deems necessary to continuation of the business, the *Kevin Steel-REA Express* test would leave it to "the discretion of the bankruptcy court to require such bargaining" (*Brada Miller, supra*, slip op. 2362). Similarly, in balancing the equities under the *Kevin Steel-REA Express* test, it would be appropriate to consider the "cost-spreading abilities of the parties" (*Brada Miller, supra*, slip. op. 2362) and whether the employer has used "the Section 365 mechanism for the sole purpose of escaping a union contract" (*id.* at 2362-2363).

The only real difference between the *Kevin Steel-REA Express* standard and the *Brada Miller* test appears to be that the former requires a threshold showing that the business is likely to fail unless the collective bargaining agreement is rejected before the bankruptcy court reaches the stage of balancing the equities. As noted above, the threshold requirement is necessary to ensure that the interests of the employees and the policies of the NLRA are not impaired by bankruptcy court nullification of collective bargaining agreements unless demonstrably necessary to accomplish the purposes of the bankruptcy laws; moreover, it is part of the test implicitly adopted by Congress in the 1978 Bankruptcy Code. The Eleventh Circuit's objection to the threshold showing requirement on the ground that it ignores the interests of the other parties to the bankruptcy proceeding is not well taken. As discussed above (pages 21-22), parties to collective bargaining agreements are in very different circumstances from parties to ordinary commercial contracts; the interests of employees, who are likely to be wholly dependent on their jobs, are not com-

parable to those of commercial creditors. In light of the special character of collective bargaining agreements and the unique concerns of the national labor policy, it is entirely appropriate to accord different treatment to rejection of such agreements than to other matters that arise in the course of bankruptcy proceedings. Moreover, the *REA Express* test does accommodate the interests of other creditors and the debtor-in-possession, since it permits rejection if it is necessary to a successful reorganization.

C. The Debtor-In-Possession Stands In The Same Position As The Debtor With Respect To Obligations Under A Collective Bargaining Agreement And Under The Labor Laws

The court below suggested (Pet. App. 12a, 21a-22a) that at least some of the restrictions of the labor laws did not apply here because the debtor-in-possession is a "new entity," different from the debtor, apparently implying that collective bargaining interests weigh less heavily for that reason. However, the "new entity" theory, which was originally advanced by the Second Circuit, is not sound. Under established principles, the debtor-in-possession stands in the same position as the debtor with respect to obligations under a collective bargaining agreement and under the labor laws.

The Second Circuit, in *Kevin Steel*, *supra*, attempted to avoid the apparent conflict between the bankruptcy laws, which permit rejection of executory contracts, and the labor laws, which prohibit unilateral termination of collective bargaining agreements, by holding that the debtor-in-possession is not the same entity as the contracting employer,

but is a new entity with its own rights and duties subject to the supervision of the bankruptcy court. It stated that, "[u]ntil the debtor here assumes the old agreement or makes a new one, it is not a 'party' under section 8(d) to any labor agreement with the union and is simply not subject to the termination restrictions of the section." 519 F.2d at 704. The Second Circuit concluded that unless a debtor-in-possession were treated as a new entity it would be placed in a worse position than a successor employer, which generally is not bound by an existing labor agreement.[19] *Ibid.*

The difficulty with the "new entity" theory advanced by the Second Circuit is that it is internally contradictory. If a debtor-in-possession is a different entity, it presumably is not bound by the debtor's collective bargaining agreement unless it assumes the agreement, so there would be no occasion for the debtor-in-possession to seek rejection in the bankruptcy court—a process that assumes the debtor-in-possession is bound by the contract until the court

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[19] A change in ownership of a business enterprise does not, of itself, relieve the new owner of an obligation to recognize and bargain with the union that represented the predecessor's employees. *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 281 (1972). Rather, where the new owner continues to operate the business in essentially the same manner, with the predecessor's employees comprising a majority of its work force, it is deemed a successor employer and is obligated to bargain with the incumbent union. However, a successor employer is not required to assume the predecessor's collective bargaining agreement (*id.* at 291), and it is ordinarily free to set initial terms of employment unilaterally (*id.* at 294-296).

permits rejection. See *In re Brada Miller Freight System, Inc., supra*, slip op. 2356.[20] Moreover, as the Eleventh Circuit noted in rejecting the analysis of the Second Circuit, "the new entity theory collides head on with the fact" that "if a bankruptcy court refuses to allow a debtor-in-possession to reject a collective bargaining agreement, the debtor-in-possession is bound retroactively to the agreement from the time of the filing of the petition." *Ibid.*[21]

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[20] The Second Circuit itself has acknowledged this contradiction. In *Truck Drivers Local Union No. 807* v. *Bohack Corp.*, 541 F.2d 312, 318, 320 (2d Cir. 1976), the court stated:

> Of course, the statement that the debtor is not a "party," and the analogy to the successor employer, cannot be taken literally, since neither affirmance nor rejection of the collective bargaining agreement would be possible by one not a party to it.

The court further acknowledged in *Bohack* that its new entity theory was devised only "for the narrow purpose of resolving otherwise conflicting provisions of the labor and bankruptcy laws" (*ibid.*).

The new entity theory has been criticized by commentators. See, *e.g.*, Note, *The Labor-Bankruptcy Conflict: Rejection of a Debtor's Collective Bargaining Agreement, supra*, 80 Mich. L. Rev. at 141-148; Note, *Bankruptcy and the Rejection of Collective Bargaining Agreements*, 51 Notre Dame Law. 819, 829-830 (1976); Note, *Bankruptcy Law—Labor Law—Rejection of Collective Bargaining Agreements as Executory Contracts in Bankruptcy*, 22 Wayne L. Rev. 165, 172-173 (1975). See also *In re Price Chopper Supermarkets, Inc., supra*, 19 Bankr. at 465.

[21] See also *Truck Drivers Local Union No. 807* v. *Bohack Corp., supra*, 541 F.2d at 321 n.15; *In re W.T. Grant Co.*, 620 F.2d 319, 321 (2d Cir.), cert. denied, 446 U.S. 983 (1980); *In re Unishops, Inc.*, 553 F.2d 305, 308 (2d Cir. 1977); *In re Alfar Dairy, Inc.*, 458 F.2d 1258, 1261 (5th Cir.), cert. denied, 409 U.S. 1048 (1972); 2 *Collier on Bankruptcy* ¶ 365.03, at 365-22 (L. King 15th ed. 1982).

Nor does the successorship analogy accurately describe the relationship between the debtor-in-possession and the debtor. The successorship doctrine contemplates that a new owner is operating the business for its own benefit. The bankruptcy statute, on the other hand, contemplates that if a reorganization is successful the business ultimately will be continued by the debtor. During the course of the reorganization the business is operated by the debtor-in-possession on the debtor's behalf.[22] As one commentator has stated, "it is difficult to see how a debtor-in-possession can be truly distinct from its former self." Note, *Bankruptcy Law—Labor Law—Rejection of Collective Bargaining Agreements As Executory Contracts In Bankruptcy*, 22 Wayne L. Rev. 165, 172-173 (1975). And see *NLRB* v. *Baldwin Locomotive Works*, 128 F.2d 39, 43-44 (3d Cir. 1942) (rejecting the contention that the debtor was not responsible for unfair labor practices committed while the debtor-in-possession was operating the business; "where managerial control and economic interest of the debtor in possession and the reorganized company are the same * * * [i]n no legally significant sense [can] * * * the [debtor] be differentiated from the debtor in possession so far as the employer-employee relationship is concerned").

Moreover, in *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972), the Court, in holding that a successor employer is not required to assume the predecessor's collective bargaining agreement, emphasized that the successor had not agreed to assume the agreement and had made clear that it

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[22] Here, petitioner's two general partners remained in control of the business following the filing of the bankruptcy petition. The business remained unchanged, although it was operated on a reduced scale (Pet. App. 3a; J.A. 58-59).

had no intention of doing so (*id.* at 286).[23] The Court concluded that requiring a successor to assume its predecessor's collective bargaining agreement in these circumstances would violate the statutory policy against compelling an employer or union to agree to any particular contractual term (*id.* at 282-284, 287). However, the debtor-in-possession is not a new employer, but rather the same employer as the debtor. Unlike a successor, it has agreed to the collective bargaining agreement; thus, it does no violence to—and indeed preserves—the principle of free collective bargaining to require it to adhere to its bargain.[24] Cf. *Golden*

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[23] The Court in *Burns* contrasted the situation in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543 (1964), in which an employer that merged with another employer that was a party to a collective bargaining agreement was held to the latter's obligation to arbitrate. The court noted, *inter alia*, that in *Wiley* the "merger occurr[ed] against a background of state law that embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation" (406 U.S. at 286).

[24] The collective bargaining agreement between Bildisco and the Union indicates that the parties expected that any successor to Bildisco would assume the obligations under the agreement. Section 21 of the agreement states (J.A. 91-92):

> This agreement shall be binding upon the parties hereto, their successors, administrators, executors, and assigns. In the event an entire operation or any part hereof is sold, leased, transferred, or taken over by sale, transfer, lease, assignment, receivership, or bankruptcy proceedings, such operation shall continue to be subject to the terms and conditions of this agreement for the life thereof. The specific provisions of this contract, excluding supplements or other conditions shall prevail. It is understood by this section that the parties hereto shall not use leasing device to a third party to evade this agreement. The Employer shall give notice of this existence of this agreement to any purchaser, transferee, leasee, assignee,

State Bottling Co. v. *NLRB*, 414 U.S. 168 (1973) (successor that acquires business with knowledge of its predecessor's unfair labor practices is required to remedy them).[25]

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etc., of the operation covered by this agreement, or any part hereof. Such notice shall be in writing with a copy to the Union at the time the seller, transferee, or leasee executes a contract or transaction as herein described. The Union shall also be advised of the exact nature of the transaction, not including financial details. In the event the Employer fails to require the purchaser, transferee, or leasee to assume the obligations on this contract, the Employer, including all partners thereof, shall be liable to the Union and to the employees covered for all damages sustained as a result of such failure to require assumption of the terms of this contract, but shall not be liable after the purchaser, transferee, or leasee has agreed to assume the obligations of this contract.

[25] In *Burns Security Services, supra*, 406 U.S. at 287-288, the Court also noted the possibility of "inequities" if a successor employer were required to assume its predecessor's collective bargaining agreement, in that such assumption may make needed "changes impossible and may discourage and inhibit the transfer of capital." To the extent that such considerations dictate that a debtor-in-possession should be permitted under Section 365 of the Bankruptcy Code to reject a collective bargaining agreement, this can be done without resorting to the fiction that a debtor-in-possession's obligations under the NLRA are those of a successor employer.

The successorship analogy, if given full scope, would diminish the debtor-in-possession's obligation to bargain with the union in a manner unnecessary to the furtherance of any bankruptcy policy. Even if a successor is required to bargain with the union, it is ordinarily free to set initial terms of employment unilaterally. See *Burns Security Services, supra*, 406 U.S. at 294-296. Thus, if the debtor-in-possession were a *Burns*-type successor, it could, following rejection, set initial terms of employment without first bargaining with the union. See *REA Express, supra*, 523 F.2d at 170-171. While accom-

The Board has held that a bankruptcy trustee, receiver or debtor-in-possession that continues to operate the business in the same manner as the debtor is not a successor, but rather an alter ego of the debtor.[26] Therefore, it assumes the debtor's obligations under the NLRA to bargain with its employees' bargaining representative, to remedy any pre-petition unfair labor practices, and to adhere to an existing collective bargaining agreement, at least until rejection has been approved by the bankruptcy court. See *I.S.G. Extrusion Toolings, Inc.*, 262 N.L.R.B. No. 7

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modation to the policies of the bankruptcy laws may require that the debtor-in-possession be relieved of a truly onerous collective bargaining agreement, there is no need to relieve it of the duty to bargain with the union before making further changes in existing terms of employment.

[26] The Board generally will find alter ego status "where the two enterprises have 'substantially identical' management, business purpose, operation, equipment, customers, and supervision, as well as ownership." *Crawford Door Sales Co.*, 226 N.L.R.B. 1144 (1976). And see *Howard Johnson Co.* v. *Hotel Employees*, 417 U.S. 249, 259 n.5 (1974) ("alter ego" status "involves a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management"). In concluding that bankruptcy trustees or debtors-in-possession may have the status of alter egos, the Board has explained that a trustee or debtor-in-possession is a "temporary custodian" of the debtor who acts as "guardian of [the debtor's] assets, with full authority to continue the operation of the business and to exercise all powers necessary to the administration of that business." *Marion Simcox, Trustee of Wagner Shipyard*, 178 N.L.R.B. 516, 518 (1969). In cases in which a trustee in bankruptcy operates the business in a substantially different manner from the debtor the Board will not find alter ego status. See *Blazer Corp.*, 236 N.L.R.B. 103 n.1, 109-110 (1978).

(June 11, 1982), slip op. 4-5; *Oxford Structures, Ltd.*, 245 N.L.R.B. 1180, 1181, 1183 (1979); *Century Printing Co.*, 242 N.L.R.B. 659, 669-670 (1979), enforced, 108 L.R.R.M. (BNA) 2279 (3d Cir. 1981); *Airport Limousine Service, Inc.*, 231 N.L.R.B. 932, 934 n.2 (1977); *Jersey Juniors, Inc.*, 230 N.L.R.B. 329, 331-332 (1977); *Marion Simcox, Trustee of Wagner Shipyard*, 178 N.L.R.B. 516, 518 (1969); cf. *Cagle's, Inc.*, 218 N.L.R.B. 603, 604 (1975).

The alter ego principle applied by the Board appropriately implements the statutory provision for coverage of bankruptcy trustees and of any agent of an employer under the NLRA, 29 U.S.C. (& Supp. V) 152(1) and (2). Unlike the theories used by the Second Circuit and the court below, the Board's alter ego principle recognizes the continuity of ownership and the substantially identical positions of the debtor and the debtor-in-possession with respect to the employer-employee relationship (see page 36, *supra*); in addition, it prevents the mere filing of a bankruptcy petition from operating to cut off rights and remedies that employees normally enjoy under the national labor laws. In any event, the new entity and successorship theories do not justify the failure of the court below to adopt a standard for rejection of a collective bargaining agreement that properly respects the interests of employees and the policies of the labor laws in protecting collective bargaining rights.

II. A DEBTOR-IN-POSSESSION NEED NOT SHOW THAT IT HAS COMPLIED WITH THE BARGAINING REQUIREMENTS FOR MIDTERM CONTRACT MODIFICATION CONTAINED IN SECTION 8(d) OF THE NLRA BEFORE OBTAINING BANKRUPTCY COURT AUTHORIZATION TO REJECT A COLLECTIVE BARGAINING AGREEMENT

The Union, petitioner in No. 82-852, agrees that the *Kevin Steel-REA Express* standard is the appropriate one for bankruptcy court rejection of a collective bargaining agreement. However, it contends (82-852 Pet. 7-23) that, as a precondition to obtaining such rejection, the debtor-in-possession must show that it has complied with the bargaining requirements for midterm contract modification contained in Section 8(d) of the NLRA, 29 U.S.C. 158(d). We disagree. First, Section 8(d) does not compel the union party to the agreement to bargain about a midterm modification if it does not wish to do so.[27] Thus, compliance with Section 8(d) procedures may be a futile exercise that a bankrupt employer can ill afford. Second, even if the union wishes to bargain about modification, the elaborate procedure of notices and waiting periods prescribed in Section 8(d) (see page 16 note 7, *supra*) is not well suited to expeditious determination of whether the bankrupt business can survive without some adjustment in the existing contract. Thus, accommodation of the labor laws and the bankruptcy laws appears to require that a debtor-in-possession not be held to strict compliance with Section 8(d) as a precondition to rejection of a collective bargaining agreement. Cf. *REA Express, su-*

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[27] See *Oak Cliff-Golman Baking Co.*, 207 N.L.R.B. 1063, 1064 (1973), enforced, 505 F.2d 1302 (5th Cir. 1974), cert. denied, 423 U.S. 826 (1975); *C&S Industries, Inc.*, 158 N.L.R.B. 454, 456-458 (1966).

pra, 523 F.2d at 169 ("When a carrier goes into bankruptcy and does not have the funds to continue operations indefinitely at existing levels and labor costs pending exhaustion of the protracted statutory [Railway Labor Act] procedures for modification of its collective bargaining agreements, § 313(1) [of the Bankruptcy Act] must govern.").

However, the fact that strict adherence to Section 8(d) procedures is inappropriate in the context of bankruptcy proceedings does not mean that the bankruptcy court should not encourage the parties to bargain in such a situation. Indeed, there is every reason to believe that a union normally will be willing to discuss modification of an agreement in cases in which the employer has gone into bankruptcy and informs the union that, absent modification, it intends to seek the bankruptcy court's permission to reject the agreement. First, the union, as the employees' representative, shares the employer's interest in ensuring the preservation of the business; if the business fails, the employees lose their jobs. Accordingly, it is not in the union's interest to insist on the maintenance of contractual terms that demonstrably will cause the business to fail.[28] Second, the bankruptcy

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[28] An employer that contends it is financially unable to meet union contractual demands or that it must receive concessions for financial reasons must, at the union's request, supply information to substantiate its claim. *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149, 152-153 (1956). The Court in *Truitt* (*id.* at 152 & n.5) noted that employees who are informed about unsatisfactory business conditions have been willing to abandon demands for increased wages and have even accepted wage decreases in the face of such conditions. And see *First National Maintenance Corp.* v. *NLRB*, *supra*, 452 U.S. at 681 n.19; Note, *The Labor-Bankruptcy Conflict: Rejection of a Debtor's Collective Bargaining Agreement*, *supra*, 80 Mich. L. Rev. at 151 & n.87.

law does not provide for partial rejection of a contract.[29] Thus, a union that exercises its right under Section 8(d) to refuse to discuss midterm modifications risks losing the entire collective bargaining agreement, including provisions that have no impact on the employer's economic vitality, as well as those a bankruptcy court may identify as burdensome.

Negotiation of modifications in a collective bargaining agreement also has advantages for the employer, so there are incentives to negotiate on both sides. If a bankruptcy court allows rejection of the agreement, the employer is freed from the provisions it considers burdensome, but it also loses benefits that such an agreement typically affords, particularly the protection of a no-strike clause.[30] See *In re Price Chopper Supermarkets, Inc.*, 19 Bankr. 462, 466 (Bankr. S.D. Cal. 1982) ("[t]he premature rejection of such a [collective bargaining agreement], without just cause, may result in retaliatory strikes by affected workers"). Moreover, the interests of other parties to the bankruptcy proceedings should be served by the achievement of a solution that is mutually agreeable to the employer and employees and avoids strikes. Thus, it is entirely appropriate for a bankruptcy court to encourage the parties to a collective bargaining agreement to attempt to reach a mutually agreeable solution before authorizing rejection. See pages 29-30 & n.17, *supra*.

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[29] See *In re Klaber Bros., Inc.*, 173 F. Supp. 83, 85 (S.D. N.Y. 1959); *In re David A. Rosow, Inc.*, 9 Bankr. 190, 193 n.5 (Bankr. D. Conn. 1981); 2 *Collier on Bankruptcy* ¶ 365.01[2], at 365-11 (L. King 15th ed. 1982).

[30] A bankruptcy court has no power to enjoin a strike that occurs during the course of a reorganization. See *Truck Drivers Local Union No. 807* v. *Bohack*, *supra*, 541 F.2d at 317-318; *In re Petrusch*, *supra*, 667 F.2d at 298-300.

III. THE NATIONAL LABOR RELATIONS BOARD MAY PROPERLY FIND THAT A DEBTOR-IN-POSSESSION VIOLATES SECTION 8(a)(5) OF THE NLRA BY UNILATERALLY CHANGING THE TERMS OF A COLLECTIVE BARGAINING AGREEMENT DURING THE PERIOD BETWEEN FILING OF A CHAPTER 11 PETITION AND ENTRY OF A COURT ORDER AUTHORIZING REJECTION OF THE AGREEMENT

The court below agreed with the Board that petitioner's unilateral changes in contract terms prior to the filing of its bankruptcy petition violated Section 8(a)(5) of the NLRA, 29 U.S.C. 158(a)(5). However, the court ruled (Pet. App. 26a) that, if on remand the bankruptcy court permits rejection,[31] "the Board will be bound by that determination, which would preclude any post-petition unfair labor practice arising from the rejected agreement."

The court's ruling did not rest on the assumption that the debtor-in-possession is not bound by the strictures of the NLRA.[32] Indeed, the court expressly ac-

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[31] The court set aside the earlier rejection of the collective bargaining agreement because the bankruptcy court had not adequately explained the basis for its action (Pet. App. 18a-20a).

[32] The courts uniformly have held that insolvency or the filing of a bankruptcy petition by an employer does not relieve that employer, any trustee in bankruptcy, or any debtor-in-possession from its statutory duty to employees under the NLRA. See *Local Joint Executive Board* v. *Hotel Circle, Inc.*, 613 F.2d 210, 215 (9th Cir. 1980); *In re Bel Air Chateau Hospital, Inc.*, 611 F.2d 1248, 1251 (9th Cir. 1979); *Kevin Steel, supra*, 519 F.2d at 704; *NLRB* v. *Coal Creek Coal Co.*, 204 F.2d 579, 580 (10th Cir. 1953); *NLRB* v. *Baldwin Locomotive Works, supra*, 128 F.2d at 43-44. Thus, a debtor-in-possession or trustee in bankruptcy is not insulated from complaints of unfair labor practice violations, either by virtue

knowledged that a debtor-in-possession is required to bargain with the union[33] (Pet. App. 22a). Rather, the court based its conclusion on the theory that the debtor-in-possession is a new entity and that, in any event, rejection of the collective bargaining agreement is retroactive to the filing of the petition.

As we have shown, pages 33-40, *supra*, the new entity theory set forth originally by the Second Circuit in *Kevin Steel*, *supra*, is erroneous and should not be applied here. Even if that theory were accepted for the limited purpose for which it was espoused by the Second Circuit—to permit rejection of collective bargaining agreements—that court has stressed that the bankruptcy laws do not authorize a debtor-in-possession to ignore its obligations under the NLRA. *Truck Drivers Local Union No. 807* v. *Bohack Corp.*, *supra*, 541 F.2d at 320. Here petitioner committed an unfair labor practice by unilaterally altering the terms of the collective bargaining agreement in the post-petition period. The eventual

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of its status as trustee, or because the enterprise in question is involved in bankruptcy proceedings. *In re Tucson Yellow Cab*, 112 L.R.R.M. (BNA) 2705 (Bankr. 9th Cir. 1983); *NLRB* v. *Evans Plumbing Co.*, 639 F.2d 291 (5th Cir. 1981); *In re Shippers Interstate Service, Inc.*, 618 F.2d 9 (7th Cir. 1980); *In re Bel Air Chateau Hospital, Inc.*, *supra*, 611 F.2d at 1250-1251; *NLRB* v. *Autotronics, Inc.*, 434 F.2d 651, 652 (8th Cir. 1970); *Ahrens Aircraft, Inc.* v. *NLRB*, No. 82-1079 (1st Cir. Mar. 28, 1983), slip op. 2-3.

[33] The General Counsel's complaint in this case alleged that petitioner's unilateral abrogation of the collective bargaining agreement violated Section 8(a)(5) of the Act (J.A. 11-12). The complaint issued prior to the ruling of the bankruptcy court permitting rejection of the agreement and was upheld by the Board on summary judgment. The nature of petitioner's obligation to bargain after rejection thus was not addressed by the Board here.

rejection of the agreement by the bankruptcy court would not expunge that unfair labor practice, and the Board therefore should not be precluded from issuing an order remedying the violation.

In support of its conclusion that the bankruptcy court's rejection of the collective bargaining agreement would have retroactive effect, the court below relied (Pet. App. 4a, 24a) on 11 U.S.C. (Supp. V) 365(g)(1), which provides that rejection of an executory contract constitutes a breach of the contract "immediately before the date of the filing of the petition." [34] The court's reliance on that provision is misplaced. Section 365(g)(1) refers only to the priority of claims for damages based on rejection of the contract, not to existence of the contract in the post-petition period. The legislative history confirms that Congress included Section 365(g)(1) to ensure that claims based on rejection of executory contracts would be treated as pre-petition claims, *i.e.*, that they would have the status of general unsecured claims. See H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 349 (1977); S. Rep. No. 95-989, 95th Cong., 2d Sess. 60 (1978). And see 2 *Collier on Bankruptcy* ¶ 365.08, at 365-40 to 365-41 (L. King 15th ed. 1982) (footnote omitted) (the purpose of Section 365(g)(1) is "to make it clear that, under the doctrine of relation back, the other party to a contract which has not been assumed is simply a general unsecured creditor").[35]

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[34] See also 11 U.S.C. (Supp. V) 502(g), which states that a claim arising from rejection of an executory contract shall be determined "the same as if such claim had arisen before the date of the filing of the petition."

[35] A similar rule applied to claims based on rejection of executory contracts under the old Bankruptcy Act. See 14 *Collier on Bankruptcy* ¶ 11-53.04[4], at 11-53-16 to 11-53-18 (J. Moore & L. King 14th ed. 1976).

It is well established that contractual obligations of a debtor continue to exist in the period following the filing of a reorganization petition. Thus, under the bankruptcy law, an executory contract, including a collective bargaining agreement, remains in force until rejected. 2 Collier *on Bankruptcy, supra*, ¶ 365.03, at 365-22. See *In re W.T. Grant Co., supra*, 620 F.2d at 321 ("only a formal rejection pursuant to § 313(1) of the Bankruptcy Act, * * * is sufficient to disaffirm an executory contract"); *In re Smith Jones, Inc.*, 17 Bankr. 126, 128 (Bankr. D. Minn. 1981) ("The debtor absent * * * repudiation or rejection must in order to enjoy the benefits of the agreement comply with its terms except in the case of [the] most exigent circumstances."). As the court stated in *Truck Drivers Local Union No. 807* v. *Bohack Corp., supra*, 541 F.2d at 321 n.15: "If the contract is rejected by the bankruptcy court, it will be deemed to have been breached as of the date of filing of the petition under Ch. XI. But like any other unilateral breach of contract, it does not destroy the contract * * *."[36]

Deeming the rejection of a collective bargaining agreement to be retroactive to the date of filing of the petition for purposes of determining unfair labor practice liability is unnecessary to furtherance of the policy of the Bankruptcy Code. That policy requires that debtors be allowed to reject collective bargaining agreements in appropriate circumstances following a proper showing in the bankruptcy court and a court order authorizing rejection. Effectuation of the policy

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[36] See also *In re W.T. Grant Co., supra*, 620 F.2d at 321; *In re Unishops, Inc.*, 553 F.2d 305, 308 (2d Cir. 1977); *In re Alfar Dairy, Inc.*, 458 F.2d 1258, 1261 (5th Cir.), cert. denied, 409 U.S. 1048 (1972).

does not require that the debtor-in-possession be permitted to act unilaterally prior to approval of rejection by the bankruptcy court. The position of the court below would sanction the debtor-in-possession's unilateral modification during the post-petition period so long as it correctly anticipated that rejection eventually would be allowed.[37] Nothing in the bankruptcy laws requires such a result.

Furthermore, the conclusion of the court below disserves the interests of employees that are protected by the NLRA. If rejection operates retroactively to wipe out the existence of a collective bargaining agreement in the period subsequent to filing of the bankruptcy petition, employees are placed in a wholly untenable position. Most employees have only their own time and skills as a source of livelihood. Ordinarily they have the option of seeking alternative employment if they are unwilling to provide services under existing contractual terms. But if rejection can operate to nullify those terms retroactively, employees could lose benefits for a period during which they worked in reliance on contractual entitlement to receive them. At the same time, debtors-in-possession would be encouraged to disregard contractual obligations long before it becomes clear that they will be

[37] Of course, since the debtor-in-possession is the party that moves for rejection of the contract before the bankruptcy court, it could control the duration of the period in which it would be free to engage in unfair labor practices under the holding of the court below. See *Brada Miller*, *supra*, slip op. 2356 n.16. The debtor-in-possession in this case began to ignore its obligations under the collective bargaining agreement even prior to filing of a bankruptcy petition. It did not apply to the bankruptcy court for approval of rejection of the agreement until some eight months after the petition was filed. See pages 5-6, *supra*.

entitled to reject an agreement. Moreover, the expectation that rejection will be retroactive would remove an important incentive for the debtor-in-possession to negotiate with the union to obtain a modification of the agreement that would preserve some employee rights before taking the drastic step of repudiating it.

Finally, the court of appeals' holding seriously impairs the Board's unique ability to protect the employees' collective bargaining rights during reorganization proceedings by issuing orders directed at unfair labor practices committed in the course of those proceedings. Such orders can operate to deter unilateral alterations in the terms of a collective bargaining agreement and also to aid employees in recovering compensation for benefits due under the agreement.[38] In a period of numerous bankruptcies, it is particularly important that the Board not be precluded from exercising its statutory responsibilities "to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice." *Nathanson* v. *NLRB*, 344 U.S. 25, 27 (1952).

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[38] A Board claim for payment of wages and other benefits owing for the period of Chapter 11 operations is a claim for costs of administration and thus would receive priority in payment from the estate. See *In re Bel Air Chateau Hospital, Inc.*, 106 L.R.R.M. (BNA) 2834, 2835 (C.D. Cal. 1980). Cf. *Reading Co.* v. *Brown*, 391 U.S. 471 (1968). In contrast, claims based on rejection of an executory contract are treated as pre-petition claims under 11 U.S.C. (Supp. V) 365(g)(1) and thus join the class of general unsecured claims. If a subsequent rejection of a collective bargaining agreement by the bankruptcy court were to strip the Board of power to remedy post-petition unfair labor practices previously committed by the debtor-in-possession, unsecured creditors would obtain a windfall at the expense of the employees, who have been working for the benefit of the creditors throughout the post-petition period.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD, PETITIONER (82-818)

v.

BILDISCO AND BILDISCO, DEBTOR-IN POSSESSION, ET AL.

AND

LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER (82-852)

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONER, LOCAL UNION NO. 408, I.B.T.

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Questions Presented

1. Did the Court of Appeals err in holding that a debtor in possession of a reorganized business may obtain rejection of a collective bargaining agreement under the Bankruptcy Reform Act of 1978 §365(a), 11 U.S.C. §365(a), without requiring that the debtor in possession first comply with the bargaining requirement for mid-term contract modification contained in the National Labor Relations Act §8(d), 29 U.S.C. §158(d), prior to obtaining rejection under the Code?

2. Did the Court of Appeals err in ruling that a debtor in possession, who petitions for rejection of a collective bargaining agreement eight months after the debtor had filed for bankruptcy, is a new juridical entity which is not bound by the debtor's labor contract and not bound by the requirements of the labor laws during the period prior to obtaining rejection, even where, as here, all of the workers employed by the debtor in possession in the relevant unit had been employed by the debtor company and were covered by the collective bargaining agreement in effect between the debtor company and the union?

3. Did the Court of Appeals err in ruling that a petition to reject a labor contract under 11 U.S.C. §365(a) of the Bankruptcy Code may be granted merely after a weighing of the equities even where rejection is not necessary for the continued operation of the company and where the standard used by this Court of Appeals directly conflicts with the more stringent test established by the Second Circuit and followed by the lower courts?

List of Parties

The petitioner in No. 82-852 is Local 408, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter ,"the Union"), the petitioner in the consolidated case No. 82-818 is the National Labor Relations Board (hereinafter, "the Board"), and the respondents in both cases are Bildisco (hereinafter, "Bildisco") and Bildisco, Debtor in Possession (hereinafter, Debtor in Possession).*

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* Case No. 82-852 arises out of the Union's appeal from the Bankruptcy Court's order granting rejection of the collective bargaining agreement. Case No. 82-818 arises out of the Board's effort to enforce its decision and order finding Bildisco and the Debtor in Possession guilty of an unfair labor practice. The cases were consolidated in the Court of Appeals and the Union and Board intervened in each other's case.

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POINT II—This Court should reverse the standard for rejection adopted by the Third Circuit because it allows for rejection of a labor contract under the Code simply upon a showing that the contract is burdensome and that rejection will ease the estate's recovery; instead, this Court should adopt the test stated by the Second Circuit, which would allow rejection only where necessary to avoid the collapse of the company and the corollary loss of jobs 36

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2 Collier on Bankruptcy (15th ed. 1981):

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2 Collier on Bankruptcy (15th ed. 1983):

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3 Collier on Bankruptcy (15th ed. 1983):

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Epstein and Landers, Debtors & Creditors (1978):

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Epstein and Landers, Debtors & Creditors (2d ed. 1982):

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H.R. Rep. 595, 95th Cong. 1st Sess. 220 at 232-234 1977), reprinted in 1978 U.S. Code Cong. & Ad. News 5963 12

Lewin, Business and the Law, N. Y. Times (May 3, 1983, at D2, col. 1 15

Lynn, Rochelle and King, Collier Handbook for Trustees and Debtors in Possession (1982):

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Note, Bankruptcy and the Rejection of Collective Bargaining Agreements, 51 Notre Dame Law. 819 (1976):

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Opinions and Judgments Below

The opinion of the Court of Appeals for the Third Circuit, entered on June 17, 1982, is reported at 682 F.2d 72 (3rd Cir. 1982) and is appended to the Union's petition for a writ of certiorari (Pa1 to Pa25).* The opinion of the District Court for the District of New Jersey was rendered on May 6, 1982, is unreported, and is appended to the Union's petition for a writ of certiorari (Pa28 to Pa34). The decision of the Bankruptcy Court was rendered on January 5, 1981, is unreported, and is included in the joint appendix submitted in connection with this brief (Ja56 to Ja77).** The Supreme Court of the United States granted a writ of certiorari in both cases on January 17, 1983.

Jurisdiction of the Supreme Court

Jurisdiction of this Court is conferred by 28 U.S.C. §1254(1) on grounds of a conflict in the courts of appeals and of the existence of issues of significant public import.

Statutes Involved

The statutory provisions involved in this case are the National Labor Relations Act, 29 U.S.C. §§151-169, specifically 29 U.S.C. §158(a) and (d), and the Bankruptcy Reform Act of 1978 (hereinafter, "Bankruptcy Code" or "Code"), 11 U.S.C. §§1-1330, specifically §356(a), 11 U.S.C. §365(a). No constitutional provisions are involved.

Statement of the Case

This matter arises out of a motion made in December 1980 by the Debtor in Possession, pursuant to 11 U.S.C.

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* "Pa" refers to the appendix attached to the petitioner Union's petition for a writ of certiorari.

** "Ja" refers to the joint appendix submitted in connection with this brief.

§365(a), to reject a collective bargaining agreement signed by Bildisco and the Union. Bildisco is a New Jersey partnership engaged in selling and distributing building supplies. Bildisco and the Union had been parties to a series of collective bargaining agreements, the most recent of which was effective from May 1, 1979 to April 30, 1982. That collective bargaining agreement expressly provided that it was binding upon the parties and their successors and that it remained binding even if the company went into bankruptcy (Ja91 to Ja92). Bildisco was not a party to any other labor contracts. Bildisco had at one time employed 18 persons in the unit covered by the collective bargaining agreement in effect with the Union. This number decreased to 3 employees by the date of the petition to reject the collective bargaining agreement. As of the date of the hearing on the motion to reject, all of the workers employed by the Debtor in Possession in the relevant work unit had been employees of Bildisco in that unit and had been covered by the collective bargaining agreement at issue. Several of the Union employees laid off by Bildisco and the Debtor in Possession had nearly 20 years of service to the company.*

Commencing in January 1980 Bildisco ceased making pension and welfare payments to the applicable trust funds on behalf of the employees covered by the collective bargaining agreement and also failed to forward to the Union the dues the company was withholding from the employees' pay checks. On April 14, 1980 Bildisco voluntarily filed for bankruptcy under chapter 11 of the Bankruptcy Code. The bankruptcy papers filed by Bisdisco contain no mention or suggestion of an intent to repudiate or reject the labor contract (Ja40 to Ja54). The bankruptcy court ap-

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* At the hearing on the petition to reject, one of the owners of the company (who was also a Debtor in Possession), stated that the company expected to have ten workers in the unit by the end of the next year (Ja59; Ja62). Approximately 40 to 45 percent of the company's labor rolls were covered by the Union contract (Ja59).

pointed the partnership as Debtor in Possession and authorized it to operate the business under 11 U.S.C. §1107. The Debtor in Possession continued to fail to make pension and welfare payments and to fail to forward to the Union the dues it deducted from the employees' pay checks. Several weeks later the Debtor in Possesion also failed to give the employees the raises called for by the collective bargaining agreement and denied them vacation pay (Ja79; Ja108 to Ja111). The Debtor in Possession never advised the Union or employees, orally or in writing, that it would not honor the labor contract or that it viewed itself as free from the terms of that contract. At no time did Bildisco or the Debtor in Possession seek to negotiate with the Union concerning changes in the collective bargaining agreement. In the summer of 1980 the Union filed unfair labor practice charges with the Board, alleging a violation of 29 U.S.C. §158(a) (1) and (5).

In December 1980 the Debtor In Possession petitioned the Bankruptcy Court under 11 U.S.C. §365(a) for rejection of the collective bargaining agreement. A hearing was held on January 5, 1981, after which the Bankruptcy Court promptly approved the petition to reject the labor contract. The Bankruptcy Court did not explain what standard it was using in approving rejection.

The Union appealed this decision to the District Court. The District Judge observed that under the superseded Bankruptcy Act judicial evaluations of petitions to reject contracts utilized a "business judgment" test for normal contracts and a more rigorous test for labor contracts. Accepting without comment the figures found by the Bankruptcy Court*, the District Court ruled that the contract

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*At the January 5, 1981 hearing the Debtor in Possession contended that rejection of the labor contract and the use of "non-union" workers would save the nearly $100,000 a year, which was slightly less than the predicted profits (Ja60). The Union, through cross-examination, contended that the savings would be approximtely $45,000, or less than half the predicted profits. See Union's briefs to Third Circuit. However, these factual disputes are not at issue in this appeal to this Court.

would have been rejected under either standard and it was therefore not necessary to determine which standard should apply. Accordingly, the District Court affirmed the Bankruptcy Court's decision approving rejection of the collective bargaining agreement in effect between Bildisco and the Union without deciding what standard of law applies. The Union then appealed to the Third Circuit.

Though neither the Union nor the Board contended that a collective bargaining agreement was exempt from the application of §365(a) of the Code, the Third Circuit commenced its decision by examining and rejecting the notion that a labor contract was outside the scope of §365(a). The court then analysed the standard which a court should employ in determining whether to approve rejection of NLRA contracts under §365(a).

The court noted that the standard for rejecting normal contracts is the "business judgment" test, whereby a contract may be rejected if the debtor in possession demonstrates that a more beneficial contract can be entered into (Pa12). The court also observed that under the superseded Bankruptcy Act the courts had established a more stringent test for rejection of labor contracts (Pa12). As the Third Circuit observed, this stricter test was first announced by a circuit court in *Local Union No. 455* v. *Kevin Steel Products Inc.*, 519 F.2d 698, 707 (2d Cir. 1975), in which the Second Circuit stated that rejection of a labor contract may occur after a "thorough scrutiny, and a careful balancing of the equities on both sides." The Third Circuit further noted that the Second Circuit subsequently expanded upon that standard by ruling that a labor contract may be rejected only where the debtor in possession shows both that rejection is necessary to save the debtor company from imminent collapse and that a balancing of the equities weighs in favor of the debtor. *BRAC* v. *REA Express, Inc.*, 523 F.2d 164, 169, 172 (2d Cir.), *cert. den.*, 423 U.S. 1017 (1975). The Third Circuit obliquely observed that the lower courts have followed the test as enunciated in *REA Express* (Pa13 to Pa14).

However, the Third Circuit expressly rejected the Second Circuit's test as stated in *REA Express,* castigating it as mere "gloss" upon, and the "illegitimate progeny" of, *Kevin Steel* (Pa13a; Pa16a). Instead, the Third Circuit declared that a labor contract may be rejected simply where the debtor in possession shows that the contract is "burdensome" and that rejection would "assist" in achieving a satisfactory reorganization (Pa16 to Pa17). Because the District and Bankruptcy Courts below had approved rejection of the labor contract without clearly stating the standard or the elements of the balancing, the District Court decision was reversed and the matter was remanded for further proceedings consistent with the Third Circuit's opinion.

Summary of Argument

(1)

The Third Circuit held that, automatically, immediately, and merely upon the initial filing for bankruptcy the debtor in possession is completely released from the debtor's labor contract and is free to unilaterally set its own terms and conditions of employment, even though the debtor in possession did not substantially alter the operation of the debtor or hire new employees. The basis for this spontaneous and premature liberation of the debtor in possession from the debtor's labor contract is found in the Third Circuit's "new entity" theory, under which the debtor in possession is deemed a separate and new juridical entity upon its appointment by the Bankruptcy Court pursuant to 11 U.S.C. §1107. The Third Circuit also analogized the debtor-in-possession to a "successor" and then stated that a successor is free from the predecessor's labor contract and may fix its own terms and conditions of employment, citing *NLRB* v. *Burns Security Services, Inc.,* 406 U. S. 272 (1972).

The Third Circuit's reasoning does not withstand scrutiny. The debtor in possession operates the same company doing the same business and, in this case, with the same employees. As the Eleventh Circuit recently stated, a debtor in possession cannot be deemed different from the debtor for purposes of the labor contract or labor laws. *Matter of Brada Miller Freight System,* Docket No. 82-7043 (11th Cir. 1983). To conclude that the appointment of a debtor in possession by a bankruptcy court creates an entirely different entity which is free from the debtor's obligations to its employees improperly glorifies hypertechnicality. *NLRB* v. *Baldwin Locomotive Works,* 128 F. 2d 39, 43-44 (3rd Cir. 1942).

Also erroneous is the analogy to a successor and the conclusion that a successor is always released from the predecessor's contract. Successorship law was designed to apply to situations where one company acquired or merged with another. *NLRB* v. *Burns, supra; John Wiley & Sons, Inc.* v. *Livingston,* 376 U. S. 543 (1964). However, here there is no merger, acquisition, or transfer of capital. Rather, the same party runs the same business. Moreover, a successor will be held to the predecessor's contract where it is perfectly clear that a majority of his employees worked for the predecessor and the successor has not expressly repudiated that contract. *NLRB* v. *Burns, supra*; *Howard Johnson Co.* v. *Detroit Local Joint Executive Board,* 417 U. S. 249 (1974). In this case the debtor in possession was the same person who owned the debtor company, employed the same workers performing the same jobs, and never gave notice that it repudiated the debtor's contract. Thus, even assuming the relevance of the successorship doctrine, this debtor in possession should have been held to the debtor's contract.

The Third Circuit's decision is also contrary to the law. There is nothing in either the Bankruptcy Code or the NLRA which supports the notion that the mere filing

for bankruptcy results in the automatic termination of the debtor's labor contract. On the contrary, those two statutes provide mechanisms to which a debtor in possession must adhere in order to modify or terminate a labor contract. The Code provides that a debtor in possession seeking to reject an executory contract must obtain the approval of the Bankruptcy Court. 11 U.S.C. §365(a). Until rejection is properly obtained by formal court order, the contract continues in full force. *Holtz* v. *Federal Reserve Bank of Kansas City*, 108 F.2d 216 (8th Cir. 1939); *In re Guardian Equipment Corp.*, 18 B. R. 864 (Bankr. S. D. Fla. 1982); 2 Collier on Bankruptcy ¶365.03 at 365-21 to 22 (15th ed. 1983).

Moreover, the automatic rejection of a labor contract violates the mid-term modification procedures contained in the NLRA. 29 U.S.C. §158(d). These procedures require the party seeking a modification in an existing contract to obtain the other party's consent to any change in the contract. *Oak Cliff-Golman Baking Co.*, 85 L.R.R.M. (BNA) 1035, 1036, 207 NLRB 1063, 1064 (1973), *enf'd*, 505 F.2d 1302 (5th Cir. 1974). As numerous courts have held, and by its own terms, (29 U.S.C. §152(1)), the NLRA applies to debtors in possession. There is no reason in law or logic to hold that a debtor in possession is bound by the labor laws but is mysteriously exempted from the debtor's contract.

The simultaneous application of the NLRA and the Code does not create a conflict; the two laws are capable of harmonious coexistence. However, substantial policy considerations dictate that compliance with the modification procedures in the NLRA should precede any effort to reject a contract under the Code. Congress has declared that industrial warfare is to be avoided by the use of the collective bargaining process. 29 U.S.C. §151. Resolution of labor disputes, including contract concessions, should be accomplished in the manner preferred by the legislature.

Moreover, utilization of the NLRA modification procedures would not hinder reorganization. If a debtor in possession were unable to obtain a union's consent to changes, it could then seek rejection under §365(a) of the Code. However, unless prerejection negotiation is required, there will be no opportunity for the union to preserve basic benefits and rights while agreeing to necessary concessions. Without the opportunity to negotiate modifications prior to rejection, industrial strife is inevitable. Therefore, this Court should rule that prior to obtaining rejection under the Code, a debtor in possession must first negotiate under §8(d) of the NLRA.

(2)

The Third Circuit held that rejection under §365(a) of the Code should be approved when a debtor in possession demonstrates that its labor contract is "burdensome" and where a weighing of equities shows that rejection will "assist" the rehabilitation of the company. In delineating this test the court eschewed the Second Circuit's test, enunciated in *BRAC* v. *REA Express, Inc.*, 523 F.2d 164, 172 (2d Cir.), *cert. den.*, 423 U.S. 1017 (1975), under which rejection may be granted only if necessary to avoid the collapse of the company. The Third Circuit's test improperly permits rejection even though it is not necessary for the survival of company or the preservation of jobs.

Unlike normal executory contracts, which may be rejected when they are shown to be burdensome, a labor contract is a unique agreement which governs the entirety of the workplace. Workers, unlike commercial adventurers, do not make momentary business deals. Rather, they are inextricably bound with management to the productive process and depend upon that relationship for salaries, vacations, pensions and health plans. Recognizing the importance of these rights, the Second Circuit limited rejection to those instances where it is necessary to preserve the

company and the jobs. *BRAC* v. *REA Express, Inc., supra.* The Third Circuit would allow rejection even though the workers' jobs are not in jeopardy, thereby needlessly sacrificing the workers' rights to expedite the company's recovery.

The Third Circuit's fear that a bankruptcy court could not adequately assess the impact of denial of rejection on the company is without merit. The lower courts have successfully applied the *REA Express* test since 1975. Moreover, the Code requires that elaborate and detailed financial statements and schedules be filed upon and after the filing for bankruptcy. Also, the reorganization plan and accompanying disclosure statement which form the heart of a chapter 11 reorganization provide full description of the estate's financial situation. These papers, and the bankruptcy court's ability to assess an estate, undermine any notion that those courts are incapable of determining whether denial of rejection will ruin the company. Because the courts are clearly able to assess the estate's financial condition, and because the *REA Express* test provides a more equitable and humane analysis of the relevant considerations, this Court should reverse the decision below in favor of the test described in *REA Express.*

POINT I

This Court should rule that, at least for purposes of labor laws and labor contracts, a debtor in possession is not automatically released from the debtor's contract merely upon the filing for bankruptcy; that a debtor in possession is bound by both the National Labor Relations Act and the Bankruptcy Code; that both the Code and the Labor Act prohibit the unilateral rejection of a labor contract and the unilateral imposition of new contract terms; and that significant policy considerations dictate that a debtor in possession wishing to modify a labor contract comply with the bargaining procedures in the Labor Act prior to obtaining rejection under the Code.

Congress has determined that the rights and responsibilities of a company in chapter 11 bankruptcy are simultaneously controlled by two statutes: the Bankruptcy Code and the National Labor Relations Act.* The Code contains a specific mechanism whereby a debtor in possession may reject an executory contract at any time prior to the confirmation of the reorganization plan by obtaining the approval of the bankruptcy court. 11 U.S.C. §365(a). The NLRA contains a system whereby a party to a collective bargaining agreement must negotiate with and obtain the consent of the other party prior to implementing mid-term modifications in that contract. 29 U.S.C. §158(d). Despite these express and unequivocal statutory provisions, the Third Circuit has ruled that a debtor in possession is completely emancipated from the company's

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* Specifically, Congress has declared that the NLRA applies to trustees in Chapter 11 bankruptcy. 29 U.S.C. §152(1) and (2). The applicability of the Code to Chapter 11 proceedings is self-evident. Significantly, the arguments in this case and in this brief deal only with a Chapter 11 reorganization, not a liquidation proceeding.

collective bargaining agreement, and free to unilaterally fix its own terms and conditions of employment, automatically and immediately upon the initial filing for bankruptcy. As a result of that decision, employees who have dedicated years of service to a company will lose their pension and welfare benefits, lose their seniority and attendant rights, lose the protections of the grievance resolution system, and suffer a reduction in wages, vacations and sick days without ever having had the opportunity to agree to mid-term concessions and without ever having had the chance to oppose a rejection petition. Simply stated, the procedures and protections conferred by Congress in the Code and NLRA have been eviscerated and disregarded by a court of appeals.

It is the Union's position that this utter destruction of the collective bargaining agreement upon the filing for bankruptcy, and the corollary grant to the debtor in possession of the awesome power to unilaterally impose whatever terms and conditions of employment it may wish, is contrary to both the NLRA and the Code. The Union contends that a debtor in possession is not distinguishable from the debtor company for purposes of labor contracts and labor laws and that a debtor in possession is bound by the debtor's labor agreement until it gains modifications or a termination in accordance with §8(d) of the NLRA or §365(a) of the Code. Finally, it is the Union's position that sound and substantial policy considerations, combined with canons of statutory construction, compel the conclusion that rejection under the Code should not be permitted unless the debtor in possession first complies with the negotiating procedures in §8(d) of the NLRA.

The Bankrupcty Code constitutes an extensive schema designed to permit and assist a financially distressed company to restructure its debt and arrange its operation so as to facilitate recovery. Though a chapter 11 reorganization is under the ultimate authority of the bankruptcy court, the debtor will normally continue to op-

erate the company as debtor in possession. 11 U.S.C. §§1101, 1107. See also H.R. Rep. 595, 95th Cong. 1st Sess. 220 at 232-234 (1977), reprinted in 1978 U.S. Code Cong. & Ad. News 5963. One device by which the debtor in possession may improve the company's economic condition is to reject an executory contract to which the debtor is a party. 11 U.S.C. §365(a).* If rejection is approved, the contract is deemed to have been breached as of the day before the initial filing for bankruptcy. 11 U.S.C. §365 (g).** A bankruptcy court faced with a petition to reject a contract under §365(a) cannot modify the contract. Rather, the court can only approve or deny the petition to reject the contract in its entirety, without compromises. *In re David A. Rosow, Inc.*, 9 B.R. 190, 193 n.5 (Bankr. D. Conn. 1981); 2 Collier on Bankruptcy ¶365.01[2] at 365-11 (15th ed. 1981).

On the other hand, the NLRA provides a mechanism whereby a party seeking to modify or alter an existing collective bargaining agreement may do so. 29 U.S.C. §158

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* 11 U.S.C. §365(a) of the Bankruptcy Code provides:

> "Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor."

This Union does not dispute the authority of a bankruptcy court to ultimately reject a labor contract.

** 11 U.S.C. §365(g) states, in pertinent part:

> "(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease—
>
> (1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, or 13 of this title, immediately before the date of the filing of the petition; or"

(d).* Section 8(d) has been interpreted by the Board and the courts to permit a party to attempt to alter a contract in mid-term, even though more than 60 days remain in the

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*29 U.S.C. §158(d) provides in pertinent part that:

"(d) For the purpose of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification.

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes with the State or Territory where the dispute occurred, provided no agreement had been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later."

contract's life. *Dunham-Bush, Inc.*, 111 L.R.R.M. (BNA) 1389, 1391, 264 NLRB No. 175 (1982); *Oak Cliff-Golman Baking Co.*, 85 L.R.R.M. (BNA) 1035, 1036, 207 NLRB 1063, 1064 (1973), *enf'd*, 505 F.2d 1302 (5th Cir. 1974). However, the party seeking a mid-term change may modify the contract only if it obtains the consent of the other party. *C&S Industries, Inc.*, 62 L.R.R.M. (BNA) 1043, 1045, 158 NLRB 454 (1966). If consent is not given, the contract may not be modified until, of course, it expires. A unilaterally imposed mid-term modification of a mandatory term of bargaining constitutes an unfair labor practice in violation of §8(a)(5) of the NLRA. *Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971); *NLRB* v. *Katz*, 369 U.S. 736, 743 (1962).

Clearly, both the Code and the NLRA provide mechanisms whereby a debtor can obtain relief from an unduly oppressive labor contract, the former by petition to and approval by the bankruptcy court, the latter by mutual consent of the parties arrived at through collective bargaining. These two avenues of redress are not mutually exclusive. On the contrary, a debtor in possession can first attempt to alleviate the problems it perceives as caused by its collective bargaining agreement by negotiating pursuant to §8(d). If unsuccessful in arriving at a mutually agreeable modification with the union, the debtor in possession can then attempt to reject the contract by application to the bankruptcy court under §365(a). The two statutes are capable of amicable coexistence in a manner which adequately protects the interests served by both laws: industrial peace and corporate rehabilitation.

Rather than essay a reconciliation of the NLRA and the Code, the Third Circuit ruled that a company wishing to free itself from a labor contract may do so simply by filing in bankruptcy; it need not gain the union's consent through negotiation and it need not obtain rejection of the contract by a bankruptcy court. Simply and solely upon the filing for bankruptcy the unionized com-

pany becomes non-union, able to set its own terms and conditions of employment and able to fire and hire whomever it wants. Gone are the pension and health benefits, gone are the arbitration procedures, gone are the wages which the workers had been earning and upon which they pay for housing, cars and food.*

This automatic emancipation of a previously unionized company was not proclaimed by Congress or the President. It was decreed by a court of appeals. In explaining its decision freeing a debtor in possession from a labor contract merely upon the filing for bankruptcy and without regard to §8(d) or §365(a), the Third Circuit provided little more than conclusory statements. In two sentences (both adopted from the Second Circuit's seminal decision in *Shopmen's Local Union No. 445* v. *Kevin Steel Products, Inc.*, 519 F.2d 698 (2d Cir. 1975)), the Third Circuit stated that a debtor in possession:

> "is a new entity, separate and apart from the pre-bankruptcy company, and does not become a party to an executory contract unless it assumes the contract. Bildisco, as a debtor-in-possession, was not a party to the collective bargaining agreement, and therefore not bound by §8(d) [29 U.S.C. §158 (d)]." (Pa12).

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* These consequences which flow from the Third Circuit's decision are not the febrile speculations of a paranoid litigant exaggerating its case. These results are actually occurring. For example, as reported in the New York Times, the Wilson Foods Corporation, the nation's largest processor of pork, filed for bankruptcy under Chapter 11 on April 22, 1983. Two days later it unilaterally reduced its workers' wages by 40 to 50 percent and substantially reduced benefits. Less than a week later the company announced a new $80 million revolving credit agreement with Citicorp Industrial Credit, Inc. Lewin, *Business and the Law*, N. Y. Times, May 3, 1983, at D2, col.1. The remainder of the article suggests that companies may be using the bankruptcy laws for ulterior reasons. *Id.* Perhaps the Labor Board was prescient when, in *Kevin Steel*, it voiced concern that companies would misuse the bankruptcy laws to escape from unfavorable labor contracts.

The Third Circuit added that:

> "The debtor-in-possession's position is analogous to that of a successor employer: it may be required to recognize and bargain with the union, but it is not a party to its predecessor's collective bargaining agreement unless it assumes that agreement. *NLRB* v. *Burns Security Services Inc.*, 406 U.S. 272, 284 (1972); *Kevin Steel*, 519 F.2d at 704." (Pa20 to Pa21).

The Third Circuit's ruling that a debtor in possession is a completely new juridical entity freed from the bonds of the labor contract immediately upon the filing in bankruptcy is wrong as a matter of law and logic. Moreover, the Third Circuit's attempt to buttress its holding by comparing the debtor in possession to a successor, and then announcing that a successor is *always* exempted from the predecessor's contract, is too facile, for it is clear from this Court's decisions that a successor may be required to negotiate with the union *before* it can change the terms of the predecessor's labor contract.

As noted above, the Code provides that a debtor in possession may reject an executory contract by gaining the approval of the bankruptcy court. 11 U.S.C. §365(a). This requirement is not some superfluous prediliction but a specific statutory dictate. It is therefore hardly surprising that the courts have long and repeatedly ruled that a contract cannot be deemed rejected, and remains binding, until formal approval is conferred by a court. See, *e.g.*, *Holtz* v. *Federal Reserve Bank of Kansas City*, 108 F.2d 216, 219-220 (8th Cir. 1939) (as long as rejection is not ordered, the contract continues in existence); *In re Guardian Equipment Corp.*, 18 B.R. 864 (Bankr. S.D. Fla. 1982) (until debtor in possession obtained formal rejection in court, it remained bound to terms of lease entered by debtor); *In re Smith Jones, Inc.*, 17 B.R. 126, 128 (Bankr. D. Minn. 1981) (absent formal rejection under the Code, the terms of the

contract continue[d] in effect and were applicable to debtor in possession); *In re Eastern Fruit Company, Inc.*, 1 B.R. 714, 716 (Bankr. E.D. Pa. 1979). See also 2 Collier on Bankruptcy ¶365.03 at 365-21 to 22 (15th ed. 1983); D. Lynn, M. Rochelle and L. King, *Collier Handbook for Trustees and Debtors in Possession* (1982) ¶23.04 at 23-16 ("although collective bargaining agreements and union contracts may be subject to review by the Bankruptcy Court by the debtor's motion to reject, [footnote omitted] until the court may conduct such review they are in full force and effect.").

In view of the requirement in §365(a) that a debtor in possession obtain court approval for rejection of a contract, and in light of the decisions correctly concluding that the debtor's contracts remain binding upon a debtor in possession until the procedure in §365(a) is pursued, the Third Circuit's decision releasing the debtor in possession from the debtor's contract upon filing for bankruptcy must be seriously questioned. The question may be posed in two related forms: 1) if upon the filing for bankruptcy the debtor in possession is not bound by nor a party to the debtor's labor contract, then why does the debtor in possession need to petition for rejection at all? and 2) if the mere filing for bankruptcy liberates the debtor in possession from the debtor's contract, then why did Congress bother to provide a procedure requiring court approval for rejection and make the retroactive breach effected by §365(g) contingent upon approvad of rejection?* The import of these questions cannot be too strongly emphasized, for the Third Circuit's decision is nothing less than a judicial rewrite of a statutory plan.

The logical flaws in the new entity theory were quickly perceived even by its creator, the Second Circuit. Just

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* The problems emanating from the notion that a debtor in possession is a new entity distinct from the debtor raises problems in areas other than labor. For example, can the debtor in possession operate under licenses granted by state or federal agencies to the debtor, or must the debtor in possession obtain new licenses?

one year after *Kevin Steel* that circuit began revision. In *Truck Drivers Local Union No. 807* v. *Bohack Corp.*, 541 F.2d 312 (2d Cir. 1976) the court explained:

> "Of course, the statement that the debtor is not a party, and the analogy to the successor employer, cannot be taken literally since neither affirmance nor rejection of the collective bargaining agreement would be possible by one not a party to it."

Id. at 320.

Sounding a similarly narrowing theme, the Second Circuit subsequently cautioned the lower courts to limit the application of the new entity theory to those cases where the unions claim that the provisions of §8(d) pertain. *In re Matter of Unishops*, 543 F.2d 1017, 1018-1019 (2d Cir. 1976). Retreating even further from its own doctrine, the Second Circuit recently stated that a labor contract is binding upon a debtor in possession if it receives benefits under it. *In re W.T. Grant Co.*, 620 F.2d 319, 321 (2d Cir. 1980). In language pertinent to the instant case, the *W.T. Grant* court found the debtor in possession bound to the debtor's labor contract because:

> "Here, Grant received benefits under the contract by permitting the workers to continue in its employ after it entered Chapter XI. As the district court stated, Grant secured 'the services of an experienced Grant personel during the Chapter XI proceeding . . .'"

Id.

Other courts and legal commentators have also questioned the soundness of the new entity theory. In *In re Price Chopper Supermarkets, Inc.*, 19 B.R. 462 (Bankr. S.D. Cal. 1982) the court, observing that the "new entity" theory was not necessary to the decision in *Kevin Steel*, stated that:

> "This new entity theory has been critized for it creates the paradoxical situation that the debtor-in-possession is cast as a new employer, apparently not bound by preexisting executory contracts and yet, it must make an appropriate showing to reject such agreements, including satisfying the higher standard imposed when dealing with applications to reject collective bargaining contracts. *See Matter of Ryan Company, Inc.*, 4 B.C.D. 64, 65 (Conn. 1978); *Note, supra* 80 Mich. L. Rev. at 148 . . ."

Id. at 456. See also *In the Matter of Allied Supermarkets, Inc.*, 6 B.R. 968, n. 8 (Bankr. E.D. Mich. 1980) (and the law review articles cited therein).*

Perhaps the final blow to the new entity theory was dealt by the Eleventh Circuit in *Matter of Brada Miller Freight Systems, Inc.*, Docket No. 82-7043 (11th Cir. 1983), in which the court was confronted with the identical question of when and how a debtor in possession may reject the debtor's labor contract. The Eleventh Circuit observed that the Second Circuit had been continually restricting the new entity notion in a series of contrived decisions. *Matter of Brada Miller, supra,* slip op. at 2356-2357. More importantly, the court found the legal obstacles of §365(a) and (g) insurmountable, explaining that a theory which frees a debtor in possession from a contract without the need to obtain formal court approval violates the Congressionally arranged plan which mandates court-approved rejection and which makes retro-

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* Though most legal commentators have eschewed the "new entity" theory, one law review article took the position that the debtor in possession may be a new entity but that "regardless of the different legal status of the Debtor in Possession, its interest in the company is indistinguishable from the debtor's for the purpose of fulfilling the debtor's Labor Act obligations, and that the Labor Act intended to bind the trustee or debtor in possession to the debtor's obligations." Note, *Labor-Bankruptcy Conflict,* 80 Mich. L. Rev. 134, 139 n.29.

active release from the contract contingent upon approval of rejection.* *Matter of Brada Miller, supra,* slip op. at 2356. Finding the new entity theory both legally and logically defective, the Eleventh Circuit declared:

> "While we recognize that the debtor-in-possession may constitute a 'new juridical entity' for some purposes,[14] we find the debtor-in-possession indistinguishable from the pre-bankruptcy corporation as far as concerns their respective obligations under the collective bargaining agreement and the labor laws that regulate the formation, existence, and termination of such agreements."

Id. at 2355-2356. (footnote omitted).

The sound reasoning of the Eleventh Circuit also emphasizes the legally and factually erroneous conclusion of the Third Circuit that the debtor in possession is a "successor" and thus not bound by the debtor/predecessor's labor contract under the successorship doctrine. Just as the new entity theory was an untenable and invalid fiction formulated to achieve a desired result, so the analogy of a debtor in possession to a successor is neither appropriate nor useful.

The courts developed the successorship doctrine to deal with labor problems arising where one company merged with, acquired or replaced another company and yet retained a number of the predecessor's employees and performed substantially the same business operation. *NLRB* v. *Burns Security Services, Inc.*, 406 U.S. 272 (1972); *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543 (1964). However, where, as here, the bankruptcy court appoints the

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* The Eleventh Circuit commented that the proponents of the "new entity" theory had yet to explain the paradox that theory creates when a petition to reject is denied and the debtor in possession is thus bound by the contract. As the Eleventh Circuit pondered, how can a non-party to the contract be held to the contract when rejection is denied?

debtor to continue to operate the company under the title of debtor in possession, there is no change in ownership nor transfer of capital. As the Eleventh Circuit properly stated, there is no difference for purposes of labor contracts between the debtor and the debtor in possession. *Matter of Brada Miller, supra.* Indeed, the Third Circuit previously stated that:

> "Court supervision of corporate reorganization affords the operating possessor no freedom from its statutory duty to its employees. And, where managerial control and economic interest of the debtor in possession and the [debtor] company are the same . . . then in no legally significant sense . . . can the [debtor] be differentiated from the debtor in possession so far as the employer-employee relationship is concerned."

NLRB v. *Baldwin Locomotive Works,* 128 F.2d 39, 43-44 (3d Cir. 1942). In short, application of the successorship doctrine to this case is neither warranted nor appropriate.

Even if successorship principles are applied here, it is patently evident that until it obtained rejection of the collective bargaining agreement in January 1981, this Debtor in Possession should have been bound by the terms of the labor contract and should have negotiated with the Union prior to changing the terms of that contract. As the Third Circuit stated, a debtor in possession is a "successor." Once that threshold question is resolved, however, the more complex inquiry concerns the extent, if any, of the successor's obligations under the predecessor's contract. The contours and content of this inquiry were delineated by this Court in two decisions, *NLRB* v. *Burns, supra,* and *Howard Johnson Co.* v. *Detroit Local Joint Executive Board,* 417 U.S. 249 (1974).

In *Burns* the predecessor company, Wackenhut, had provided security services at the Lockheed facility and was

party to a three-year collective bargaining agreement. Approximately one month after it entered into that collective bargaining agreement, Wackenhut was replaced by the Burns company, which had submitted a lower bid to Lockheed. Burns employed 27 of Wackenhut's workers and brought in 15 of its own employees from other facilities. The union claimed that Burns was bound by all of the terms of the collective bargaining agreement it had entered into the month before with Wackenhut. However, when it bid for the Lockheed job, Burns had made clear that it was not consenting to the Wackenhut labor contract. *NLRB* v. *Burns, supra* at 286. Emphaszing that, unlike in *Wiley,* Burns had not purchased or merged with Wackenhut but simply underbid a competitor, this Court noted that the sole basis for the union's contention that Burns was bound by the Wackenhut contract was that Burns hired enough of Wackenhut's employees to impose a bargaining relationship. *NLRB* v. *Burns, supra.* The Court found that factor an inadequate basis on which to hold Burns to all of the terms of the Wackenhut labor contract or to require it to negotiate prior to initiating changes in that contract. *NLRB* v. *Burns, supra* at 287, 294. However, and significantly, the Court added that:

> "Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative *before* he fixes terms."

NLRB v. *Burns, supra* at 294-295. (emphasis added). The Court added that its holding also had the beneficial effect of furthering the transfer of capital, an important objective in a free economy. *NLRB* v. *Burns, supra* at 288-289.

In *Howard Johnson* v. *Detroit Local Joint Exec. Bd., supra,* this Court reminded companies and unions that the existence of a successor relationship, and the extent of the successor's bargaining duties, are factual questions which can only be determined on a case by case basis. *Id.* at 256. The *Howard Johnson* Court ruled that where the purchasing company expressly informed the seller in advance that it refused to adhere to the seller's collective bargaining agreement, where all of the seller's employees were notified that upon the sale of the company they would be terminated, and where the purchaser hired its own workforce (of whom only a small percentage had worked for the predecessor), then the purchaser was not bound by the seller's bargaining agreement and was not required to negotiate prior to setting its own terms and conditions of employment, even though the predecessor's contract provided that it was binding upon successors.*

Assuming, *arguendo,* that successorship theory is applicble where a debtor in possession replaces a debtor, the facts in this case make it readily apparent that this Debtor in Possesion was bound by Bildisco's collective bargaining

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* The *Howard Johnson* decision also made explicit what was implicit in *Burns,* to wit, a successor is not required to hire the employees of the predecessor and may recruit an entirely new workforce. *Howard Johnson Co., supra* at 261-262. Thus, under the "new entity" theory a debtor in possession (either as a non-party or successor to the contract) could terminate all of the debtor/predecessor's employees and hire a completely new workforce, as long as it does not fire/hire solely because of a person's union association. *Howard Johnson, supra* at 202 n. 8; *In re Unit Parts Co.,* 10 B.R. 970, 979 (Bnkr. W.D. Okla. 1981). When this right is viewed in connection with the Second Circuit's holding in *W.T. Grant, supra* (that a debtor in possession is bound by the debtor's labor contract because it continued to employ the debtor's workers), it becomes apparent that a debtor in possession has not only the authority but the inducement to terminate the debtor's employees immediately upon its appointment by the bankruptcy court under 11 U.S.C. §1107. This prospect is certain to cause industrial warfare.

agreement and should have negotiated before it changed any of its terms. When it filed for bankruptcy, Bildisco's papers contained no indication that it was rejecting or disavowing its collective bargaining agreement (Ja40 to Ja50). The bankruptcy court appointed the debtor as Debtor in Possession, meaning that the same persons who owned and operated Bildisco remained in place without change. There was no interruption or change in operation. The Debtor in Possession did not fire Bildisco's employees and hire new ones; it continued to employ the same workers in the same jobs performing the same duties as under Bildisco. In sum, there was no change in or replacement of the owners, managers, supervisors, employees, or the business and operations of Bildisco, other than a gradual reduction in the number of union employees. Moreover, the collective bargaining agreement entered into between Bildisco and the Union expressly provided that it applied to all successors, administrators and receivers, even if Bildisco went into bankruptcy (Ja91 to Ja92). At no point did Bildisco or the Debtor in Possession ever inform the workers that the Debtor in Possession was not bound by the terms of the contract or of its intent not to be bound by the contract.* Furthermore, there is no issue here of hinder-

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* In similar circumstances this Court observed that when a new employer acquires the assets of the predecessor and continues the predecessor's business without significant change in operations, the employees will understandably view their job situations as unchanged. *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168, 183 (1973). That view is even more reasonable when, as here, neither the union nor employees were told that the Debtor in Possession perceived itself as legally freed from the collective bargaining agreement. The respondents may argue that the failure to make pension and welfare payments upon the Debtor in Possession's appointment in April 1980, and the failure to give the required wage increases which were due in May 1980, amount to notice that it refused to adhere to the contract similar to the notice given

(Footnote continued on following page)

ing the transfer of capital through corporate mergers or acquisitions.* Under the successorship decisions of this Court, this Debtor in Possession was not only a successor but fell squarely within the circumstances noted in *Burns* under which the successor is required to negotiate with the union prior to implementing any changes in the collective bargaining agreement. *NLRB* v. *Burns*, 406 U.S. at 294-295.

That this Debtor in Possession was obligated to negotiate before effectuating changes in Bildisco's contract is consistent with recent decisions of the lower courts. For example,

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(Footnote continued from preceding page)

in *Howard Johnson*. However, the notice of repudiation in *Howard Johnson* was given before the acquisition and transfer of ownership, not after, and was in writing. This Union had no basis to believe that the failure to contribute to the funds constituted rejection of the contract because Bildisco had stopped making contributions in January 1980, four months prior to filing for bankruptcy. As with so many companies who are delinquent for months in contributions to the funds, the unions and/or funds eventually institute proceedings for delinquent payments but do not view the failure to pay as a disavowal of the contract. Finally, the failure to accord the workers the wage increases called for in the contract occurred several weeks after the filing for bankruptcy and is irrelevant here, for the Third Circuit's decision centers on the debtor in possession's rights as of the day of filing for bankruptcy, not several weeks later.

* The *Burns* rule facilitates the unimpeded transfer of capital by providing that if a company sells its business, the buyer would normally not be bound by the existing collective bargaining agreement. However, where a company files for bankruptcy there is no transfer of capital or assets. Moreover, the Bankruptcy Code provides ample statutory means by which the debtor in possession can alleviate the company's distressed condition, including a restructuring of the debt and court-approved rejection of contracts. It is not necessary to afford a company facing or in bankruptcy additional benefits by providing that the filing for bankruptcy itself frees the company from its labor contracts. See, *Note, Labor-Bankruptcy Conflict, supra* at 144.

in *Local 92* v. *Strabley Building Supply, Inc.*, 98 L.R.R.M. (BNA) 3025 (N.D. Ohio 1978) Strabley Inc. purchased the assets of Danson Inc., which had a collective bargaining agreement with a union and under which Danson was behind in payments to the pension and welfare funds. Strabley Inc. knew of the arrears, and when it purchased Danson Inc. it refused to make any payments to the funds. The *Strabley* court noted that the successor never signed a collective bargaining agreement with the union nor ever expressed in writing any intent to adhere to the predecessor's contract. Moreover, the court observed that, as in *Howard Johnson,* the existence in the predecessor's collective bargaining agreement of a provision declaring that the collective bargaining agreement was binding on any purchaser or successor was not, by itself, dispositive, *Local 92* v. *Strabley Building Supply, supra.* However, the court concluded that, given the existence of the successorship clause, combined with the failure of the purchaser to expressly repudiate the collective bargaining agreement, the successor would be bound to the contract. *Local 92* v. *Strabley Building Supply, supra* at 3030-3031.

A similar result was reached in *In re Plaza Mission Bottling Co., Inc.*, 14 B.R. 428 (Bankr. E.D. N.Y. 1981). In that case the Plaza Beverage Company was party to a collective bargaining agreement. After the company transferred away its canning operation and retained its bottling operation, the bottling operation went into bankruptcy, keeping most of its non-supervisory workforce and all of its supervisory personnel. The union then filed claims for unpaid wages and benefits, which the bankrupt opposed by contending that it was not bound by the prior collective bargaining agreement. Pointing to the continuity in operation and personnel between the debtor company and the bankrupt, the court found that a successor relationship existed. *In re Plaza Mission Bottling Co., supra* at 431. The bankrupty then argued that even if it were a successor, it was not bound by the substantive provisions of the prede-

cessor's labor contract. After carefully examining this Court's successorship cases, the *Plaza Mission* court concluded that a successor could, under certain circumstances, be held to the preexisting labor agreement. As the court explained:

> "Presence of the following factors have been found sufficient to hold that the successor employer has assumed its predecessor's labor agreement.
>
> "(1) the collective bargaining agreement contains a provision providing that said agreement would be binding upon the employer's successors;
>
> "(2) did the successor employer disclaim any obligation to honor the pre-existing collective bargaining agreements; and
>
> "(3) did the successor employer honor any of the provisions of the collective bargaining agreement."

Id. at 433.

Under the facts of the case before it, the *Plaza Mission* court found the successor bound to the terms of the predecessor's collective bargaining agreement. See also *NLRB* v. *World Evangelism, Inc.*, 656 F.2d 1349, 1355 (9th Cir. 1981) (where it is "perfectly clear" that the successor plans to retain subtsantially all of the predecessor's employees in the relevant unit, "the successor must consult with the union before altering terms and conditions" of the predecessor's labor agreement); *General Teamsters, Chauffeurs, and Helpers, Local Union No. 249* v. *Bill's Trucking Co.*, 493 F.2d 956, 961-963 (3d Cir. 1974) (where there is an absolute identity or substantial continuity of business between predecessor and successor, successor will be bound to predecessor's labor contract.).

In light of the foregoing it is evident that neither the provisions of the Code nor the principles of the successorship doctrine support the Third Circuit's declaration that a debtor in possession is liberated from the debtor's col-

lective bargaining agreement simply, solely, and spontaneously upon the filing for bankruptcy.

The emancipation of the debtor in possession from the debtor's labor contract upon the filing for bankruptcy also violates the NLRA. As noted above, the NLRA itself states that it applies to debtors in possession in chapter 11 bankruptcy proceedings. 29 U.S.C. §152(1). The courts, including the Third Circuit in its decision below, have repeatedly ruled that a debtor in possession is bound by the labor laws. *Truck Drivers Local Union No. 807* v. *Bohack Corp.*, 541 F.2d at 318-319; *Shopmen's Local Union No. 455* v. *Kevin Steel, supra; BRAC* v. *REA Express, Inc.*, 523 F.2d 164 (2d Cir.), *cert. den.*, 423 U.S. 1017 (1976); *Durand* v. *NLRB*, 296 F.Supp. 1049 (W.D. Ark. 1969); *In re Penn Fruit Co.*, 1 B.R. at 716. That a company in bankruptcy is subject to the labor laws is neither legally novel nor methedologically impracticable. *Nathansan* v. *NLRB*, 344 U.S. 25 (1952); *In re Tucson Yellow Cab Co.*, 112 L.R.R.M. (BNA) 2705 (9th Cir. B.A.P. 1983); *Matter of Shippers Interstate Services, Inc.*, 618 F.2d 9 (7th Cir. 1980); *In re Bel Air Chateau Hospital, Inc.*, 611 F.2d 1248 (9th Cir. 1979); *BRAC* v. *REA Express, supra;* 2 Collier on Bankruptcy ¶365.03, *supra.* The Third Circuit's liberation of the debtor in possession from the debtor's collective bargaining agreement has no support in the applicable statutes. Nowhere in the NLRA is there any suggestion or statement that a filing for bankruptcy or appointment of a debtor in possession automatically abrogates an existing labor contract. *Matter of Brada Miller, supra; NLRB* v. *Baldwin Locomotive, supra; In re Penn Fruit Co., supra.*

In sum, the debtor in possession is bound by the rules set forth in both the Code and the NLRA and must comply with those procedures before altering or ending the debtor's labor contract. If the debtor in possession unilaterally al-

ters a mandatory term or condition of employment before it obtains rejection, then it has committed an unfair labor practice violative of §8(a)(5) of the NLRA. 29 U.S.C. §158(a)(5).

Since both the Code and the NLRA provide mechanisms for dealing with the same contract, the obvious question is whether one mechanism must or should precede the other. Ample and important policy considerations, coupled with rules of statutory construction which frown upon judicial decisions which needlessly ignore one law in favor of another, compel the conclusion that compliance with the collective bargaining procedures delineated in §8(d) should be followed prior to and as a condition of obtaining rejection under §365(a). *Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974). See also Note, *Labor-Bankruptcy Conflict, supra* at 150-152.

As this Court has emphasized, the NLRA represents a carefully conceived and exhaustively arranged system designed to facilitate peaceful labor relations through negotiation. *Chemical Workers* v. *Pittsburgh Plate Glass Co., supra; United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960). The NLRA specifies that it is the policy of this nation to protect commerce "by encouraging the practice and procedure of collective bargaining. . . ." 29 U.S.C. §151. As this Court previously explained, §8(d) was enacted in the 1947 amendments to the NLRA, and an "important theme" of those revisions was to stabilize collective bargaining agreements. *Chemical Workers* v. *Pittsburgh Plate Glass Co., supra* at 186. This Court then declared that:

> "The structure and language of §8(d) point to a more specialized purpose than merely promoting general contract compliance. The conditions for a modification or termination set out in paragraphs (1) through (4) [of §8(d)] plainly are designed to regulate modifications and terminations so as to facilitate agreement in place of economic warfare."

Chemical Workers v. *Pittsburgh Plate Glass Co., supra* at 187.

Given the indisputable import of the collective bargaining process, and in view of its origination in the legislative branch, the judiciary must proceed with utmost caution in arriving at a decision which would in theory or practice eviscerate the bargaining process. *NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 401-404 (1952). The balance of power between unions and management was struck by Congress and is a matter of fundamental public policy, not to be restructured by the judiciary. *Teamster Union Local 20* v. *Morton*, 377 U.S. 252, 259 (1964). In fact, this Court has continually exhibited a proper deference to the labor laws. For example, in *John Wiley & Sons* v. *Livingston*, 376 U.S. at 548-550, this Court declared that a successor company which was not a party to the predecessor's labor contract would nonetheless be obliged to comply with the arbitration provisions in that contract. The *Wiley* Court found that it would derogate from the policies of the labor laws if a change in the corporate structure or ownership of a company had the automatic result of removing the contractual duty to arbitrate to which the prior company had agreed. *Id.* at 549.

The precepts expressed and inherent in *Chemical Workers*, in *American Nat'l Insurance*, and in *Wiley* are applicable here. The bargaining process is central to labor relations and must be retained whenever possible. Requiring a debtor in possession to adhere to the bargaining provisions set forth in §8(d) would preserve the method of labor relations preferred by Congress. If a debtor in possession (or the debtor before filing for bankruptcy) desires a less onerous labor agreement, it should fully inform the union of its financial straits and the modifications necessary for the successful operation or rehabilitation of the company. Though a union faced with the facts

and figures may insist on the existing terms of the agreement, it is likely that the union will agree to a mutually satisfactory modification, thereby precluding the need for the debtor in possession to seek rejection. Though the debtor in possession may be in a seriously weakened economic condition, it does have the significant advantage which attaches to its ultimate weapon: **rejection.**

A union which adamantly refuses mid-term concessions faces the prospect that the company will obtain rejection of the contract. If the contract is rejected the union may find itself no longer representing the employees at the plant, and the employees will find themselves with lower wages, no pensions or welfare benefits, no seniority rights, no arbitration procedures, and no holiday or sick days. Certainly Bildisco's employees suffered a similar fate. Thus a debtor in possession should be required to comply with the negotiating provisions of §8(d). If unsuccessful in its effort to gain the union's consent to concessions, then the debtor in possession may seek refuge in rejection.

If application of §8(d) to a debtor in possession threatens the survival of the estate or imperils successful rehabilitation, the debtor in possession can apply to the bankruptcy court for protection. *In re Tucson Yellow Cab Co., supra* at 2707; *In re Bel Air Chateau Hospital, Inc., supra* at 1251. The bankruptcy court could either order an expedited negotiation schedule or, in extreme cases, waive the §8(d) procedures in their entirety. *In re Tucson Yellow Cab Co., supra;* Note, *Labor-Bankruptcy, supra* at 150. However, §8(d) is simply not so time consuming as to cause problems due to delays.*

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* Section 8(d) is not nearly as slow and elaborate as the contract modification procedures in the Railway Labor Act. 45 U.S.C. §156. Indeed, this Court observed that the mid-term bargaining steps contained in the RLA (§156) were purposely designed to be cumbersome and lengthy so as to allow the parties to cool-off and minimize the chances of a strike in the railroad industry. *Shore Line R.R.* v. *Transportation Union,* 396 U.S. 142, 143 (1969).

However, it is unlikely that the bankruptcy courts will often be asked to interdict or restrict the §8(d) procedures. A review of the reported cases concerning rejection of labor contracts reveals that, as in the instant case, many petitions to reject are made months, if not years, after the filing in bankruptcy.* See, *e.g., Local Union No. 455* v. *Kevin Steel, supra* (company filed in bankrupcty in September 1973 and later petitioned for rejection of labor contract, which was granted in March 1974); *In the Matter of Ryan Co., Inc.*, 4 B.C.D. 64 (Bankr. D. Conn. 1978) (company filed for bankruptcy on July 29, 1977, applied to reject labor agreement on January 11, 1978, and rejection was approved on March 10, 1978); *Bohack Corporation* v. *Teamsters, Local 807*, 431 F.Supp. 646 (S.D. N.Y. 1976) (company filed for bankruptcy on July 30, 1974 and rejection of labor contract was approved on May 28, 1976).

Moreover, recent history shows that a union requested to alter a contract will, out of sheer self-preservation, accede to mutually agreeable modifications. One need look no further than the daily papers to see that unions, recognizing the harsh realities of the current economic climate and the trend of companies to relocate in an effort to reduce labor costs, will agree to reductions in wages, to forego raises, to alter expensive work rules, and to reduce vacations and benefits in an effort to keep the company operating and the employees working. For example, the Transport Workers Union ratified a contract with American Airlines which provides for job security and wage increases, but which also eliminates paid meal periods, relaxes rules regarding utilization of employees in dif-

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* Rejection under §365(a) is available to a debtor in possession at any time prior to the confirmation of the plan. 11 U.S.C. §365 (d)(2); 2 Collier on Bankruptcy ¶365.03 at 365-19 (15th ed. 1983). Many months may elapse before the debtor even files a plan, no less gains confirmation of it. See 11 U.S.C. §1121. See also D. Epstein and J. Landers, *Debtors & Creditors* (2d ed. 1982) at 525.

ferent jobs, and slows progression up the wage scale. 112 L.R.R. (BNA) 202. The United Steelworkers have agreed to an industrywide contract which calls for an immediate pay cut of $1.31 per hour, elimination and reduction of future wage increases and cost-of-living increases, and the end of extended vacation and bonuses. 112 L.R.R. (BNA) 180. Indeed, the Steelworkers have adopted a two-tiered approach to contracts, under which special concessions are to be afforded financially distressed facilities. 112 L.R.R. (BNA) 68-69. At the Wheeling-Pittsburgh Steel Corporation, the Steelworkers agreed to concessions whereby the workers accepted a $1.53/hour cut in pay, deletion of cost of living increases in 1983, deletion of the dental insurance plan, and a loss of one week of vacation for employees now entitled to three weeks vacation each year. 112 L.R.R. (BNA) 22. Similar concessions mark numerous other contracts. See, *e.g.*, 110 L.R.R. (BNA) 3, 83; 109 L.R.R. (BNA) 213, 214, 228, 229, 321.

The point is that a prerejection bargaining requirement allows the parties to modify or eliminate the most burdensome contract terms while preserving provisions which protect fundamental interests of the workers. For example, in *In re Southern Electronics Co., Inc.*, 23 B.R. 348 (Bankr. E.D. Tenn. 1982) the company stated that it could live with the contract's wage rates but found the seniority rules unmanageable because they allegedly restricted the company's ability to terminate unproductive senior workers. The myriad factors which bear on cost and efficiency are susceptible of numerous possible compromises. The parties are limited only by their imaginations, guided by their respective needs. However, if a debtor in possession is freed from the collective bargaining agreement upon the filing for bankruptcy or is permitted to obtain rejection of the collective bargaining agreement without first negotiating, then there is no opportuntiy for the parties to even attempt to devise a mutually agreeable concession contract which would at least maintain some of the basic benefits for the workers.

The bargaining steps contained in the NLRA and the rejection procedure in the Code are clearly capable of harmonious coexistence. Where two statutes apply to the same situation and are capable of coexistence, a court should not ignore one. *Morton* v. *Mancari*, 417 U.S. at 550-551. In this case the concordance can be achieved by requiring bargaining before rejection. Indeed, to permit rejection without prior negotiations would needlessly and improperly derogate from the fundamental rights embodied and prescribed in the labor laws. Note, *Labor-Bankruptcy Conflict, supra* at 149-152. The inevitable consequence of allowing a debtor in possession to reject a labor contract without first having negotiated is industrial strife.

If this Court concludes that a debtor in possession is not required to comply with §8(d) before it imposes its own terms and conditions of employment, it is submitted that this Court should, at the very least, rule that negotiation with the union is a central and crucial consideration to be accorded substantial weight in a bankruptcy court's determination whether to approve rejection. Without the opportunity to agree to contract changes which reduce the company's costs while retaining essential benefits and protections, the workers will be subjected to terms and conditions of employment determined exclusively by management. It can hardly be expected that a debtor in possession freed from the debtor's contract would continue the wage rates, pension and health plans, and fringe benefits which the company had been providing. Surely the employees who have dedicated long years of service to the company deserve more than to be at the mercy of management without the opportunity to negotiate concessions in the contract. Contrary to the implication of the Third Circuit, employees are not on the same footing as a company's normal commercial creditors. Unlike a business which enters into a contract to supply parts, the workers under a union contract are an inextricable component of the company's production process. *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. at 578-579.

The appellate and trial courts have noted their preference for prerejection negotiation. As the bankruptcy court in California recently stated:

> "Thus, in all but the most extreme cases, the debtors-in-possession, or Chapter 11 trustees, should be required to move cautiously and bargain in good faith with their unions, in an attempt to foster a cooperative attitude in working towards a successful reorganization. This attempt at renegotiation should occur before coming before the court to achieve a unilateral rejection. [footnote omitted]. Obviously, in cases where the survival of the business itself is at stake, the urgent need to reject will require immediate action. In such cases, the required bargaining process will, by necessity, be kept to a minimum."

In re Price Choppers Supermarkets, Inc., 19 B.R. at 466. See also *Matter of Brada Miller supra*, slip op. at 2362; *In re Alan Wood Steel Co.*, 98 L.R.R.M. (BNA) 2400, 2401 (E.D. Pa. 1978).

The applicability of both the NLRA and the Code to a debtor in possession, the strong public and statutory policy favoring resolution of industrial problems through negotiation and agreement, and the simple fairness of allowing the union to negotiate a concession contract all combine to compel the conclusion that a debtor in possession should be required to follow the bargaining system set forth in §8(d) prior to obtaining rejection under §365(a). However, if adherence to §8(d) is not established as a mandatory condition precedent to rejection, it should be established as a central and critical consideration to be given great weight by a bankruptcy court. Indeed, if the debtor in possession has not engaged in prerejection negotiations under §8(d), rejection should be permitted only where absolutely necessary to avoid the imminent collapse of the company.

While the concerns addressed by the bankruptcy laws are unquestionably important, the purposes underlying the

labor laws are equally essential. To allow a company to unilaterally free itself of the collective bargaining agreement would not only contravene the provisions of the labor laws, it instills in the worker the ill feeling "that he is a pawn in industr[illegible]bject to the arbitrary power of the employer." *NLRB* v. *Highland Park Mfg. Co.*, 110 F.2d 632, 638 (4th Cir. 1940).

POINT II

This Court should reverse the standard for rejection adopted by the Third Circuit because it allows for rejection of a labor contract under the Code simply upon a showing that the contract is burdensome and that rejection will ease the estate's recovery; instead, this Court should adopt the test stated by the Second Circuit, which would allow rejection only where necessary to avoid the collapse of the company and the corollary loss of jobs.

Whether this Court concludes that rejection of a labor contract may be entertained only after the requirements of §8(d) are followed or concludes that prior negotiation is a crucial and significant factor which should be afforded substantial weight in a bankruptcy court's evaluation of a petition to reject the labor contract, the Union acknowledges that a bankruptcy court may ultimately adjudicate a petition to reject a labor contract. However, the evaluative process for rejection adumbrated by the Third Circuit is totally inadequate, for it permits rejection simply where it would "assist" a rehabilitation. The Third Circuit's standard suffers from the cruel shortcoming that it would sacrifice all of the workers' rights and protections even though not necessary for the company's continued operation and the continued employment of the workers. In arriving at this test, the Third Circuit declined to follow the more rigorous (and appropriate) test established by the Second Circuit, under which rejection would

be allowed only where necessary to the continued operation of the company and thus to the preservation of jobs. *BRAC* v. *REA Express, Inc.*, 523 F.2d 164, 172 (2d Cir.), *cert. den.*, 423 U.S. 1017 (1975).

Before examining the standard adopted below and comparing it to the more stringent test enunciated by the Second Circuit, it is helpful to examine the nature of collective bargaining agreements so as to better understand the ramifications of rejection. As this Court succinctly stated:

> "The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate . . . The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant . . .
>
> . . . A collective bargaining agreement is an effort to erect a system of industrial self-government. When most parties enter into a contractual relationship they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties. This is not true of the labor agreement. The choice is generally not between entering or refusing to enter into a relationship, for that in all probability preexists the negotiations. Rather it is between having that relationship governed by an agreed-upon rule of law or leaving each and every matter subject to temporary resolution dependent solely upon the relative strength, at any given amount of contending forces."

United Steelworkers v. *Warrior & Gulf Nav. Co.*, 363 U.S. at 578-579.

The rights created and affected by a labor contract are two-fold: the rules which maintain order at the workplace and the rules which guarantee economic security to the workers. Among the former are seniority, grievance-arbitration procedures for dispute resolution, disciplinary procedures, and no-strike/no lock-out clauses. Among the latter are welfare and pension plans. Unlike a normal commercial contract, a collective bargaining agreement is an organic being whose terms are gleaned not merely from its express clauses but also from the history of relations between the workers and the company. *John Wiley & Sons* v. *Livingston*, 376 U.S. at 550. Furthermore, the rights and benefits earned by the workers are not measured by the existence of any one contract; rather, those rights and benefits derive their value from the expectation that the parties will continue to sign and adhere to successive labor contracts guaranteeing the pension and seniority rights accrued during any single contract.

Rejection of a labor contract means nothing less than termination of pension and health plans, reduction in wages, termination of all benefits such as vacation and sick days, and termination of the grievance resolution procedures within the workplace. Discussing the impact of rejection, the Second Circuit observed that it means "depriving the employees affected of their seniority, welfare and pension rights, as well as other valuable benefits which are incapable of forming the basis of a provable claim for damages." *Shopmen's Local No. 455* v. *Kevin Steel*, 519 F.2d at 707 (quoting from *In re Overseas National Airways, Inc.*, 238 F.Supp. 359, 361 (E.D. N.Y.

1965)).* The courts have continued to note that workers cannot obtain an adequate, or any, remedy when a labor contract is rejected. *Matter of Brada Miller, supra,* slip. op. at 2361; *In re Southern Electronics Co., Inc., supra* at 363. See also *Suffin* v. *Unity Button Works, Inc.,* 258 N.Y. 863, 864, 144 Misc. 7 84 (N.Y. Sup. Ct. 1932) (where employer disregarded contract and fired union workers, the damage was irreparable not only because of harm to workers but also because "the union loses in prestige and trade unionism in attractiveness, an injury incapable of compensation.").

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* Under the Code, the rights of workers and unions to payments are as follows: all claims for services rendered before 90 days prior to the initial filing for bankruptcy are general unsecured claims which have no statutory priority. Claims for wages, salaries, and vacation, severance and sick pay earned within 90 days before the filing for bankruptcy receive third priority as unsecured claims. 11 U.S.C. §507(a) (3). Claims for contributions to employee benefit plans arising from work performed within 180 days before the filing for bankruptcy are accorded a fourth priority as unsecured claims. 11 U.S.C. §507(a)(4). Wages and benefits earned during the reorganization period are deemed administrative expenses, which are given first priority. 11 U.S.C. §507(a)(1). However, and significantly, once a contract is rejected, it is deemed breached as of the *day before* the filing for bankruptcy. 2 Collier on Bankruptcy ¶365.08 at 365-40 to 41 (15th ed. 1983), 11 U.S.C. §365(g)(1).

In 17,282 asset cases concluded during the fiscal year, ending June 30, 1976, 14.5 percent of the total allowed claims were paid. Debtors satisfied 64.3 percent of secured claims, 29.6 percent of priority claims, and 6.5 percent of general unsecured claims. D. Epstein & J. Landers, Debtors and Creditors (1978) at 629. Of course, all claims for wages or fund contributions, even if afforded a priority, are unsecured and thus payable only after secured claims are paid in full. Also, the amount of wages and benefit plan contributions given priority status is severely restricted. Under 11 U.S.C. §507(a)(3)(B) each employee's priority claim is limited to $2,000.00. Moreover, the amounts protected under 11 U.S.C. §507(a)(4) are limited to the number of employees times $2,000, *minus* payments made as wage priority payments or to other benefit plans. D. Epstein & J. Landers, *Debtors & Creditors* (2d ed. 1982) at 563-564; 3 Collier on Bankruptcy ¶507.04 at 507-40.8 to 41 (15th ed. 1983).

In light of the drastic and irremediable consequences attending rejection of a labor contract under which the workers have given years of service, it is understandable that most courts have been extremely cautious in approving rejection. In the first appellate consideration of this issue, the Second Circuit declined to apply the normal test for rejecting commercial contracts and, instead, stated that rejection may be authorized "only after a thorough scrutiny, and careful balancing of the equities on both sides . . ." *Shopmen's Local 455* v. *Kevin Steel, supra* at 707.* However, the *Kevin Steel* test contained little content with which to guide the lower courts. Note, *Bankruptcy Law-Labor Law, Rejection of Collective Bargaining Agreements As Executory Contracts in Bankruptcy,* 22 Wayne L. Rev. 165, 176 (1975).

Shortly after the *Kevin Steel* decision, the Second Circuit clarified and reinforced the test. In *BRAC* v. *REA Express, Inc.,* 523 F.2d at 172, the court explained that "in view of the serious effects which rejection has on the [debtor's] employees," rejection would be permissible

> "only where it clearly appears to be the lessor of two evils and that, unless the agreement is rejected, the [company] will collapse and the employees will no longer have their job."

In cases involving petitions to reject labor contracts made under both the superseded Bankruptcy Act and the new Code, the lower courts have applied the test as delinated in

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* Under the normal test, called the "business judgment" test, an executory contract may be rejected where an existing contract can be replaced with a more profitable one or where the debtor in possession shows that the existing contract is burdensome. *Matter of Brada Miller, supra,* slip op. at 2359; 2 Collier on Bankruptcy 15th ed., *supra,* ¶365.03 at 365-14. According to Collier, the leading case in defining the test for normal contract rejection is *Group of Institutional Investors* v. *Chicago, Milwaukee St. Paul & Pacific R.R. Co.,* 318 U.S. 523, 549-551 (1943).

REA Express. See, *eg., In re Figure Flattery, Inc.,* 88 Lab. Cas. (CCH) ¶11,850 (S.D.N.Y. 1980); *Matter of Allied Technology, Inc.,* 8 B.R. 366, 368 (S.D. Ohio 1980); *Matter of Allied Supermarkets, Inc.,* 6 B.R. 968 (E.D. Mich. 1980); *Bohack Corp.* v. *Local Union No. 807,* 431 F.Supp. 64 (E.D. N.Y.), *aff'd,* 567 F.2d (2d Cir. 1977), *cert. den.,* 439 U.S. 825 (1978); *In re Alan Wood Steel Co.,* 449 F. Supp. 165, 169 (E.D. Pa. 1978), *appeal dismissed,* 595 F.2d 1211 (3d Cir. 1979); *In re Penn Fruit Co.,* 92 L.R.R.M. (BNA) 3548 (E.D. Pa. 1976); *In re Studio Eight Lighting,* 91 L.R.R.M. (BNA) 2429 (E.D. N.Y. 1976); *In re David Rosow, Inc.,* 9 B.R. at 192-193; *In the Matter of the Connecticut Celery Co.,* 106 L.R.R.M. (BNA) 2847 (Bankr. D. Conn. 1981).

Unmoved by the prospect of vast numbers of this nation's workers innocently losing pension, health and seniority benefits and suffering substantial reductions in wages as a consequence of often incompetent management, and unconvinced of the practicality of the strict standard applied by numerous courts which deal first hand with the intricacies of reorganization, the Third Circuit scorned the *REA Express* case, denouncing it as improper "gloss" on and the "illegitimate progeny" of *Kevin Steel* (Pa13 n.11; Pa16). In place of the *REA Express* test, which would sacrifice the workers' benefits only when the alternative was the loss of jobs, the Third Circuit embraced a lax "weighing of equities" test. Worse, the nature of the considerations recited by the Third Circuit, and the level at which the scale is to tip in favor of rejection, is essentially indistinguishable from the business judgment test utilized for normal commercial contracts.

In order to obtain rejection in the Third Circuit, the debtor in possession need only demonstrate that the labor contract is "burdensome" to the estate and then present sufficient facts to allow the court to determine whether rejection would "assist" in the rehabilitative process (Pa16 to Pa17). The Third Circuit recommends that in examining the various concerns of the parties, a court should

compare the rights of the covered employees to the sacrifices which other creditors are making (Pa16). In the final analysis, the bankruptcy court should approve rejection where that "will assist the debtor in possession or trustee to achieve a satisfactory reorganization." (Pa16 to Pa17).

The close kinship between the Third Circuit's test and the business judgment test is manifest. Under the Third Circuit's analysis, a labor contract may be rejected where a) the contract is "burdensome," b) the sacrifices of all creditors are considered and apportioned appropriately, and c) the rejection will "assist" the reorganization. In the "business judgment" test a contract may be rejected where a) the contract is burdensome, b) the sacrifice of all creditors are considered and apportioned appropriately, and c) the rejection would benefit the estate. *Institutional Investors* v. *Chicago, M., St. P. & P.R.R. Co.*, 318 U.S. at 549-550. Interestingly, the only case cited by the Third Circuit in its description of its test is *Institutional Investors* v. *Chicago, M. St. P. & P.R.R. Co.* (Pa16). Despite its contention that it was distilling out the impurities from the Second Circuit's test, the Third Circuit has gone further. Its alchemy has so altered the atoms that what was once *Kevin Steel* is now *Bildisco* rubber.

Of course, the issue is not the name attached to the standard but its content and workability. In defending its test the Third Circuit offered two rationales: that it may be impossible for a bankruptcy court to predict the success of a reorganization until very late in the arrangement proceedings, and that the *REA Express* test exhalts the contract over the question whether the workers will have jobs at all (Pa14). Neither of these reasons withstands examination.

Despite the fears of the Third Circuit, the lower courts have found the *REA Express* test entirely workable. The long list of cases adhering to *REA Express* noted above demonstrates, without more, that bankruptcy courts are

capable of predicting whether rejection is necessary to the continued operation of the debtor company. This prognostic ability is hardly surprising, for the Code not only allows but requires the early submission of detailed lists and schedules and then the filing of an elaborate reorganization plan and disclosure statement.

When a company files in bankruptcy under chapter 11 it must file a schedule containing a list of all creditors and of all assets. 11 U.S.C. §521(1). Some districts also require the initial lists to contain a summary of secured, priority, and unsecured debts and a projected operating statement for the 30 days following filing. *Collier Handbook, supra,* ¶21-06 at 21-15. If the debtor has a cash problem, it may have a hearing whereby it shows that a lender is adequately protected by proving that there is an equity cushion or by providing additional liens. 11 U.S.C. §§361, 363(e). Shortly after filing in chapter 11 the debtor in possession must file schedules of debts, executory contracts, and a list of equity security holders. 11 U.S.C. §521. Schedules must be filed relating to: priority debts under §507(a)(3)-(6); secured creditors (including the type of security involved, its value, and the amount secured); unsecured creditors; real property and any liens encumbering such property; personal property (including cash, bank accounts, furnishings and equipment, trucks and other vehicles, machinery and fixtures, inventory, patents and other intangibles, bonds, negotiable and non-negotiable instruments, liquidated debts owed to debtor, unliquidated claims, insurance policies, annuities, stock in other companies, and interests in partnerships); all other property; and all exempt property. See *Collier Handbook, supra,* ¶22.01 and 02, at 22-1 to 22-13. Also, the debtor in possession files a statement of financial affairs which provides a detailed explication of the company's operation. *Id.*

Of course, the plan forms the heart of a reorganization. The plan divides creditors into classes and spells out, ***inter alia,*** how each class is to be treated, how the plan is to be

executed, and how executory contracts are treated. 11 U.S.C. §§1121, 1123. The debtor in possession must also prepare a disclosure statement which is designed to provide creditors with sufficient information for making an informed judgment concerning the plan and its likelihood of success. 11 U.S.C. §1125(b), (d) and (e). The disclosure statement outlines the nature and history of the business, the risks inherent in the plan, the timing of the expected recovery, any options available, an analysis of the claims so that the assets can be determined accurately, and any other matter which should be brought to the attention of an interested party. *Collier Handbook* ¶25.10 at 25-47 to 25-54. The disclosure statement must be approved by the court at a hearing. 11 U.S.C. §1125(b).

The very purpose of the various lists, plan, and the disclosure statment is to permit the interested parties, the creditors' committee, and a court to make an educated evaluation of the operation of the company and the success of the proposed plan. Plainly stated, the Third Circuit's unsupported assertion that a bankruptcy court could not adequately assess the impact which denial of rejection would have upon the estate is contradicted by both the elaborate filing and plan requirements of the Code and by the proven ability of the courts to evaluate petitions to reject under the *REA Express* standard.

Also meritless is the Third Circuit's second objection to the *REA Express* test: that it exhalts the contract over jobs. This is simply not true. In order for a debtor in possession to obtain rejection under *REA Express* it must demonstrate that the denial of rejection will cause the imminent collapse of the company, thereby destroying the workers' jobs. Indeed, the *REA Express* test focuses the inquiry on whether denial of rejection will cost jobs. If the debtor in possession fails to show that rejection is necessary to the continued operation of the company, then rejection is not necessary to save the workers' jobs and rejection would plainly be inappropriate. See, Note,

Bankruptcy and the Rejection of Collective Bargaining Agreements, 51 Notre Dame Law. 819, 832 (1976) ("*REA Express* test is a "workable compromise" between the interests of the labor laws and bankruptcy laws which "takes into account the unique nature of the collective bargaining agreement as an embodiment of tangible and intangible human rights" in a manner which "does not preclude or hinder corporate reorganization . . .").

Succinctly stated, the *REA Express* test stands for this principle: where a debtor company can continue to operate without requiring that the workers surrender accrued benefits and wages, then fairness precludes a court from approving rejection and needlessly depriving those workers of pension, health and other benefits. In fact, to allow rejection even when it is not essential to the continued operation of the company would wrongfully promote the interests of the estate over those of the workers. Frankly, workers are not similarly situated to other creditors and should not be asked to sacrifice in the same manner as other creditors. Rather, workers have an inextricable and ongoing relationship with the company and should be protected so long as such protection does not entail the demise of the company and the jobs it provides.

To be sure, a job without benefits is better than no job at all, but that is a false issue. The *REA Express* test only states that if the company can continue with the labor contract then it should do so. Contrary to that, the Third Circuit would needlessly allow for the destruction of salaries, vacation and sick days, pensions, and health plans simply to "assist" a debtor return to health. While it is regettable that the Second Circuit did not adequately articulate the appropriate standard in its initial grapple with this issue, that should not detract from the propriety of the reconsideration it enunciated in *REA Express*. A second child, even if illegitimate, may be wiser than the first born.

The respondents may argue that labor contracts covered by the NLRA should not be accorded any special consideration because Congress, by inaction, has declined to favor them. This proposition has two themes. First it is argued that when Congress enacted §365(a) in 1978 it altered the previous provision by conferring special treatment on various lease contracts. By providing benefits to some contracts, so the argument runs, Congress knew how to afford similar consideration to labor contracts but failed to do so, thereby allegedly evincing an intent that labor contracts be treated as normal contracts. The other, similar version of this argument is that Congress expressly exempted the wages of railroad workers from the jurisdiction of bankruptcy judges, thereby evidencing an intent to have NLRA contracts treated in the same manner as any other executory contract. 11 U.S.C. §1167.* Obviously, both aspects of this argument are predicated upon Congressional silence. For that reason, and for several other reasons, both versions lack merit.

The 1978 revisions in the bankruptcy laws were made two years after the decisions in *Kevin Steel* and *REA Express*. Congress is presumed to be aware of judicial interpretations of statutes when it reenacts legislation. *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978). When Congress reenacted §365(a) it did not alter it in any substantial manner. Congressional promulgation of a provision without substantial alteration strongly supports an intent by Congress to approve of and adopt the existing judicial interpretations of that statute. *Cannon* v. *University of Chicago*, 411 U.S. 677, 696-698 (1979); *NLRB* v. *Gullett Gin Co.*, 340 U.S. 361, 366 (1951). More

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*11 U.S.C. §1167 of the Code (11 U.S.C. §205(n) of the superseded Bankruptcy Act) provides in relevant part that no judge shall change the wages or working conditions of railroad employees except in the manner prescribed in §156 of the Railway Labor Act.

importantly, judicial deference to labor contracts under §365(a) and its predecessor provision was never premised upon any particular language in the statute. Rather, it was grounded in the sound recognition of the unique nature and important role of labor contracts. *In re David Rosow, Inc.*, 9 B.R. at 192. Those same policy considerations still pertain, and none of the modifications made in reenacting §365(a) diminish or preclude the applicability of those considerations to the current statute. *Id.*

Nor is the exemption in §1167 for wages and working conditions for railway workers pertinent here. Preliminarily it should be noted that the Railway Labor Act was passed in 1933, the exemption in §1167 was enacted in 1934, the NLRA was created in 1935, and §8(d) of the NLRA was added in 1947. This legislative history hardly permits the inference that in enacting the railway workers' exemption in 1934 Congress deliberately intended to affect a statutory scheme which did not yet exist or a statutory provision which was enacted 15 years later. Note, *Bankruptcy and the Rejection of Collective Bargaining Agreements, supra* at 828. Moreover, the very courts which rejected the argument that the exemption in §1167 for railway workers should be applied to NLRA contracts are the same ones which established the special, rigorous test for labor contracts. *BRAC* v. *REA Express, supra; Shopmen's Local No. 455* v. *Kevin Steel, supra.*

Unlike this Union, the unions in those cases contended that NLRA contracts should be construed as within the §1167 exemption. While finding the arguments mustered by those unions appealing, the courts were ultimately unpersuaded. Thus, as in *REA Express* and *Kevin Steel,* the courts refused to completely immunize NLRA contracts from the purview of §365(a). However, and significantly, those same courts recognized the extraordinary nature of labor contracts and concluded that, though reviewable under §365(a), they should be treated with ex-

treme caution. Clearly the existence of §1167 does not and should not detract from the strict test established by the Second Circuit for evaluating NLRA contracts under §365(a).

Ineluctably, this Court is burdened with the task of defining the standard by which a labor contract should be rejected. Though the conflict between the circuits must now be left behind, their disagreement has at least forged the issue: should the rights of the workers be utterly destroyed simply to ease the recovery of a troubled company, or should those rights be preserved unless their sacrifice is absolutely necessary to the successful rehabilitation of the company and the preservation of the jobs themselves. The Draconian consequences of rejection must not be forgotten or belittled, for they include nothing less than wages, pensions, health insurance, seniority, arbitration rights, and unionism itself. No more fundamental rights exist in a free economy than those attached to the ability to secure and preserve a decent wage, a pension for retirement, and the medical needs of one's family. Surely these basic needs and rights should be preserved unless necessary for survival of the company and the preservation of the jobs. This Union asks no more, this nation's workers deserve no less.

CONCLUSION

For all of the foregoing reasons it is respectfully submitted that the judgment of the Court of Appeals should be affirmed in so far as it reverses the decision of the District Court, but that it should be reversed in so far as it delineates the role of the labor laws and the standard for rejection of a labor contract in a bankruptcy proceeding.

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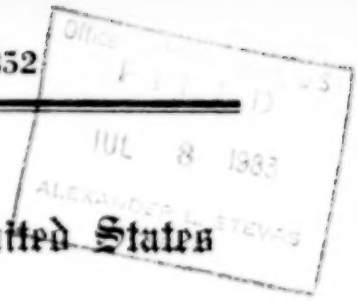
NOS. 82-818 and 82-852



IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD, PETITIONER (82-818)

v.

BILDISCO AND BILDISCO, DEBTOR-IN POSSESSION, ET AL.

AND

LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER (82-852)

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS, BILDISCO AND BILDISCO, DEBTOR IN POSSESSION

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Questions Presented

1. Whether the standard formulated by the Court of Appeals for rejection of a collective bargaining agreement by a Chapter 11 trustee or debtor in possession, under which the bankruptcy court is required to balance the competing equities, is appropriate and proper.

2. Whether a debtor in possession is obligated to comply with the bargaining requirements for midterm contract modification contained in Section 8(d) of the National Labor Relations Act, 29 U.S.C. 158(d), as a precondition to seeking bankruptcy court authorization to reject a collective bargaining agreement.

3. Whether a debtor in possession may be found to have committed an unfair labor practice by unilaterally changing the terms and conditions of employment in the period between the filing of a Chapter 11 petition and the entry of an order permitting rejection of a collective bargaining agreement.

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Table of Authorities

Cases Cited

American A. & B. Coal Corp. v. Leonardo Arrivabene, S.A., 280 F.2d 119, 124 (2d Cir. 1960) 38, 40

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Capital Service, In re, 136 F.Supp. 430, 438 (S.D. Cal. 1955) 42

Chicago Rapid Transit Co., In re (7th Cir. 1942) cert. denied, 317 U.S. 683 38

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Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board, 417 U.S. 249, 256 (1974) 31, 35

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Local Joint Executive Board v. Hotel Circle, Inc., 613 F.2d 210, 214 (9th Cir. 1980) 30

Lorillard v. Pons, 434 U.S. 575 (1978) 16

McCormick Lumber & Mfg. Corp., 144 F.Supp. 804, 805 (D. Or. 1956) 28, 38

Middleton, In re, 3 B.R. 610 (B. Ct. E.D. Pa. 1980) 38

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NLRB v. Burns Security Services, Inc., 406 U.S. 272 (1972) 28-31

NLRB v. Gullet Gin Co., 340 U.S. 361 (1951) 16

North Atlantic and Gulf Steamship Co., In re, 204 F.Supp. 899, 909 (S.D.N.Y. 1962), aff'd. sub nom. 38

Northern Indiana Oil Co., In re, 669, 675 (7th Cir. 1950); cert. denied, 340 U.S. 883 28

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Price Chopper Supermarkets, Inc., In re, 19 B.R. 462, 466-67 (B.Ct. S.D. Cal. 1982) 32, 38, 42

Reisenwebers, Inc. v. Irving Trust Co., 293 U.S. 566 38

Rochester Shipbuilding Corp., In re, 32 F.Supp. 98 (W.D.N.Y. 1940) 28

Rovine Corp., In re, 6 B.R. 661, 666 (B.Ct. W.D. Tenn. 1980) 38

Schilling v. A/S/D/S Dannebrog, 320 F.2d 628 (2d Cir. 1963) 38

Shopmen's Local Union No. 455 v. Kevin Steel Products, Inc., 519 F.2d 698, 707 (2d Cir. 1975) ..17, 18, 23, 27, 29

Southport Petroleum Co. v. NLRB, 315 U.S. 100, 106 (1942) 35

Sunflower Oil Co. v. Wilson, 142 U.S. 313, 322 (1892) 28

Theatre Holding Corp. v. Mauro, 17 B.R. 430, 431 (S.D.N.Y. 1980) aff'd 681 F.2d 102 (2d Cir.) 41

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United Cigar Stores Co., In re, 69 F.2d 513, 515 (2d Cir. 1934), cert. denied, sub nom 38

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Statutes Cited

Former Bankruptcy Act, 11 U.S.C. 1 et seq.:

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Bankruptcy Reform Act of 1978 (Bankruptcy Code, 11 U.S.C. 101 et seq.:

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11 U.S.C. §1122(a) 20

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11 U.S.C. §1129(b)(1) 21

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National Labor Relations Act, 29 U.S.C. 151 et seq.:

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2 Collier on Bankruptcy, ¶365.01, pp. 365-6-365-8 (15th ed.) 27

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2 Collier on Bankruptcy, ¶365.03, p. 365.20 (15th ed.) 39

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---

BRIEF FOR RESPONDENTS, BILDISCO AND BILDISCO, DEBTOR IN POSSESSION

Statutory Provisions Involved

Respondents believe that in addition to the statutory provisions set forth in Petitioners' brief, resolution of this case involves consideration of other portions of Section 365 of the Bankruptcy Code, 11 U.S.C. §365. The pertinent provisions of this statute provide:

> "§365. Executory contracts and unexpired leases.
>
> (a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.
>
> (b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—
>
> (A) cures, or provides adequate assurance that the trustee will promptly cure, such default;
>
> (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
>
> (C) provides adequate assurance of future performance under such contract or lease.
>
> (2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to—
>
> (A) The insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession of a trustee in a case under this title or a custodian before such commencement.

(3) For the purposes of paragraph (1) of this section, adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance—

(A) of the source of rent and other consideration due under such lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease will not breach substantially any provision, such as a radius, location, use, or exclusivity provision, in any other lease, financing agreement, or master agreement relating to such shopping center; and

(D) that assumption or assignment of such lease will not disrupt substantially any tenant mix or balance in such shopping center.

(4) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the debtor, other than a default of a kind specified in paragraph (2) of this subsection, the trustee may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.

(c) The Trustee may not assume or assign an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from excepting performance from or rendering performance to the trustee or an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegations of duties; and

(B) such party does not consent to such assumption or assignment; or

(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

(d)(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

(2) In a case under chapter 9, 11, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of the debtor at any time before the confirmation of a plan, but the court, on request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

• • •

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an unexpired lease of the debtor constitutes a breach of such contract or lease—

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, or 13 of this title, immediately before the date of the filing of the petition;"

Counter-Statement of the Case

On April 14, 1980, Bildisco, a New Jersey general partnership, filed a voluntary petition for reorganization pursuant to Chapter 11 of Title 11 of the United States Code. The bankruptcy court subsequently authorized Bildisco to operate its business as a debtor in possession.

At the time of the Chapter 11 filing Bildisco was a party to a collective bargaining agreement with Local 408 of the Teamsters Union (hereafter "the Union"). In December of 1980 Bildisco filed an application with the bankruptcy court pursuant to 11 U.S.C. §365(a) for an order authorizing it to reject the collective bargaining agreement.

On January 5, 1981 the bankruptcy court conducted a hearing on Bildisco's application. The sole witness at the hearing was Salvatore Valente, one of Bildisco's general partners. Mr. Valente testified that by operating without the labor contract his company would be able to save approximately $100,000 in 1981. Other than cross-examining Mr. Valente, the Union offered no evidence to refute his testimony or to demonstrate the consequences of rejection on the three union employees still on the debtor in possession's payroll at the date of the hearing.

On January 15, 1981, the bankruptcy judge entered an order authorizing the debtor in possession to reject the collective bargaining agreement. On appeal the district court affirmed the bankruptcy court order. The Union thereupon lodged an appeal to the United States Court of Appeals for the Third Circuit.

On July 31, 1980, the General Counsel of the National Labor Relations Board (hereafter "the Board" or "the NLRB") filed a complaint against Bildisco. The complaint alleged that Bildisco and Bildisco, debtor in possession, had violated 29 U.S.C. §§158(a)5 and (a)(1) by unilaterally changing existing terms and conditions of employment. Specifically, it was alleged that Bildisco and Bildisco, debtor in possession, had failed to make required pension, health and welfare contributions, to remit union dues and to pay wage increases provided for in the collective bargaining agreement. An amended complaint was issued on October 8, 1980.

On January 27, 1981, twelve days after the bankruptcy court authorized rejection of the labor agreement, the General Counsel filed a motion for summary judgment based upon Bildisco's failure to file an answer to the complaint.

On February 9, 1981 the Board issued an order to show cause why summary judgment should not be granted. Bildisco filed a response to the order to show cause informing the Board of the entry of the bankruptcy court order authorizing rejection of the collective bargaining agreement. The response noted that under the Bankruptcy Code rejection of the collective bargaining agreement was retroactive to the date of the filing of the Chapter 11 petition, and that, based upon the bankruptcy court's order, no labor agreement existed after April 14, 1980. Bildisco

further argued that any monetary obligations arising from the failure to make contributions prior to the Chapter 11 filing were properly to be treated as claims subject to allowance in the reorganization proceedings.

On April 23, 1981, the Board granted the motion for summary judgment finding "as a matter of fact" that the debtor in possession was the alter ego of the pre-chapter 11 company. The Board's order directed the debtor in possession to cease and desist from refusing to bargain and pay the contributions, remitances and wage increases provided for in the labor agreement. Despite its notification that the bankruptcy court had authorized rejection of the union contract, the Board made no mention of this fact nor explained why, in its view, it was free to order the debtor in possession to comply with the contract despite the entry of a federal court order directly to the contrary. The NLRB applied to the Third Circuit for enforcement of its order which application was consolidated with the union's appeal.

The court of appeals concluded that collective bargaining agreements are executory contracts subject to rejection under 11 U.S.C. §365(a). The court also held, however, that given the public policy favoring collective bargaining agreements the courts should apply a more stringent standard to applications to reject such agreements than is normally applied to other types of executory contracts. In place of the business judgment test, under which a debtor in possession will be allowed to reject a collective bargaining agreement upon a mere showing that rejection will benefit the bankrupt estate, the court formulated a standard which imposes a double burden on the debtor in possession. First, the debtor in possession must demonstrate that the collective bargaining agreement is burdensome to the estate. Once this requirement has been satisfied,

the debtor in possession must make a factual presentation sufficient to permit the court to conclude that the competing equities weigh in favor of rejection. Because in its view the bankruptcy court had failed to adequately articulate the basis for its decision to allow rejection, the court remanded for reconsideration in light of the standards it had formulated.

The court also refused to enforce the Board's order. Rejecting the Board's conclusion that a debtor in possession is merely the alter ego of the pre-bankrupt company and relying upon prior decisional law, the court held that a debtor in possession is a new entity and thus not a party to nor bound by the substantive terms of an existing collective bargaining agreement.

The court further held that rejection of an executory contract relates back to the date of the filing of the Chapter 11 petition. If on remand the bankruptcy court again permits rejection, the Board will be foreclosed from finding that the debtor in possession's failure to comply with the terms of the agreement constituted an unfair labor practice, since no agreement was in effect subsequent to the date of the Chapter 11 petition.

Summary of Argument

1. The balancing of the equities test formulated by the court below to govern applications by Chapter 11 trustees or debtors in possession to reject collective bargaining agreements recognizes and protects the interests of unionized employees by requiring the bankruptcy court to consider the impact of rejection on employee rights in light of the favored status of these rights as expressed in the NLRA. The Third Circuit's test also recognizes that protection of employee rights should not be elevated

to the point where it prevents a debtor in possession from continuing its business and restructuring its finances in a manner fair and equitable to all of its creditors. The court's standard thus successfully accommodates the policies of labor protection and business rehabilitation.

The test advocated by Petitioners, under which a debtor in possession would be permitted to reject a collective bargaining agreement only if it could demonstrate that compliance with its terms would result in liquidation, is not supported by the language of the Bankruptcy Code and is inconsistent with fundamental bankruptcy policy which requires equitable treatment for all creditors.

In most Chapter 11 cases the ability of a debtor in possession to implement a plan of reorganization cannot be accurately predicted until well after the filing of the petition. At least in the early stages of a proceeding, therefore, a debtor in possession will be unable to demonstrate to a certainty that adherence to a collective bargaining agreement will cause its collapse. By the time this fact does become clear it may be too late to stave off a liquidation with the resulting loss of all of the employees' jobs.

Unionized employees are far from powerless to protect their interests even when a labor agreement is rejected. The union remains their bargaining representative and the debtor in possession is required to negotiate with respect to new terms and conditions of employment. The employees are free to strike should negotiations fail. The employees also have the right to file claims for damages arising from the rejection of the collective bargaining agreement and to assert priority administration claims for the fair market value of services provided to the debtor in possession prior to rejection.

2. The Third Circuit properly rejected the Union's contention that a debtor in possession must comply with the requirements of Section 8(d) of the NLRA governing midterm modifications of collective bargaining agreements before seeking permission to reject a collective bargaining agreement. The Court's holding that a debtor in possession is a new entity not bound by the terms and conditions of the pre-Chapter 11 entity's labor agreement is consistent with both the fiduciary status of a debtor in possession under the Bankruptcy Code and with decisional law holding that the filing of a Chapter 11 petition frees the debtor in possession from performing its obligations under an executory contract unless such contract is affirmatively adopted.

The Union's position that a debtor in possession is bound by a collective bargaining agreement and cannot seek rejection until it has complied with the time-consuming requirements of Section 8(d) would force a debtor in possession to comply with all of the terms of a collective bargaining agreement, no matter how financially onerous, while at the same time preventing it from seeking prompt approval to disaffirm the agreement. Placing a debtor in possession in this position would undoubtedly redound to the detriment of the employees themselves by forcing numerous companies into liquidation before they are unable to obtain an order authorizing rejection.

The analogy drawn by the Third Circuit between a debtor in possession and a successor employer is persuasive. The policy of fostering the resuscitation of financially moribund businesses underlying the freedom of a successor employer to set initial terms and conditions of employment is especially compelling in the case of a debtor in possession. In the legal context of a Chapter 11 proceeding, moreover, a debtor in possession

cannot be deemed to have adopted the pre-bankruptcy company's collective bargaining agreement by its conduct since adoption can only result from a court order.

3. The Board's theory that a debtor in possession is the alter ego of the pre-Chapter 11 company and commits an unfair labor practice by changing the terms and conditions of employment suffers from the same defects as the Union's assertion that a debtor in possession is required to comply wilth Section 8(d) of the NLRA. A debtor in possession, far from being the alter ego of the pre-bankruptcy company, is a fiduciary granted new rights and charged with operating its business for the benefit of its creditors subject to control and review by the bankruptcy court.

A debtor in possession, as a matter of well-settled case law, is not obligated to perform under an executory contract unless and until the contract is adopted with the approval of the bankruptcy court. Moreover, if an executory contract is rejected, the rejection relates back to the date of the Chapter 11 petition. The debtor in possession is relieved of all contractual liabilities arising subsequent to the filing of the Chapter 11 petition.

This conclusion is emphasized by the case law holding that in the event of rejection the other party to the agreement is entitled to fair compensation for benefits conferred upon the estate subsequent to the Chapter 11 filing. This right is founded upon equitable principles akin to *quantum meruit*, however, and not upon the contractual liabilities specified in the contract.

The Board's assertion that a debtor in possession is bound by the terms of a labor agreement until it is dis-

affirmed subverts the basic policy underlying the whole doctrine of rejection. The courts and Congress have historically recognized that a debtor in possession must be given a reasonable period of time in which to determine whether an executory contract is beneficial or burdensome. During this period it is not required to perform under the contract. Requiring the debtor in possession to comply with the terms of an executory contract prior to its decision to adopt or reject it would shackle the estate with the precise obligations Section 365 is designed to remove. Moreover, the debtor in possession's ability to evaluate the impact of the collective bargaining agreement on its operation would be undermined by the financial burdens imposed by the agreement.

Because rejection of a collective bargaining agreement is retroactive to the commencement of the Chapter 11 proceedings, an order permitting rejection is in effect a determination that the agreement termin. 'ed as of the date of the petition. The Board therefore is precluded from finding that the debtor in possession's failure to adhere to its terms constituted an unfair labor practice.

POINT I

The balancing of the equities test formulated by the Court below to govern applications by Chapter 11 trustees or debtors in possession to reject collective bargaining agreements successfully accommodates the competing public policies embodied in the National Labor Relations Act and Chapter 11 of the Bankruptcy Code.

The decision of the court below represented the first instance in which a court of appeals addressed the standard to be applied in considering whether a Chapter 11 debtor in possession or trustee should be permitted to reject a collective bargaining agreement pursuant to Section 365(a) of the Bankruptcy Code.[1] The court recognized that this issue required the accommodation of the competing policy goals of labor protection, as embodied in the National Labor Relations Act ("NLRA"), and of business rehabilitation, as expressed in Chapter 11 of the Bankruptcy Code. It therefore held that applications to reject labor agreements must be subject to a more stringent standard than that applied to other categories of executory contracts.

Generally, a debtor in possession may disaffirm an executory agreement if it can satisfy the business judg-

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[1] Although not defined in the Bankruptcy Code, an executory contract is generally understood to include any contract on which performance remains due to some extent on both sides. House Report No. 95-595, 95th Cong., 1st Sess. 347 (1977); Senate Report No. 95-989, 95th Cong., 2nd Sess. 58 (1978). Both the Union and the Board concede that a collective bargaining agreement is an executory contract subject to rejection pursuant to Section 365(a).

ment test which requires only a showing that rejection will benefit the estate. See 2 *Collier on Bankruptcy*, ¶365.03 (15th ed.).[2] The court of appeals ruled, however, that the favored status of union employees, as recognized in Sections 7 and 8 of the NLRA, 29 U.S.C. §§157 and 158, rendered the business judgment test inappropriate in considering applications to reject collective bargaining agreements.

Under the standard formulated by the Third Circuit, a debtor in possession seeking to reject a labor agreement must make a threshold showing that the contract is burdensome to the estate. Once this initial burden is satisfied, the debtor in possession must present facts sufficient to demonstrate to the court that the competing equities tip in favor of rejection.

In weighing the equities, the bankruptcy court is required to give consideration to the rights of unionized employees as expressed in the national labor policy. The court must also consider the claims and interests of the debtor's other creditors and make a reasoned determina-

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[2] While Section 365(a) refers to a trustee's right to reject executory contracts, a debtor in possession may exercise this right pursuant to Section 1107(a) of the Bankruptcy Code, 11 U.S.C. §1107(a), which provides:

> "Subject to any limitations on a trustee under this chapter and to such limitations or conditions as the court prescribes, a debtor in possession shall have the rights, other than the right to compensation under Section 330 of this title, and powers, and shall perform all the function and duties, except the duties specified in Sections 1106(a)(2), (3) and (4) of this title, of a trustee serving in a case under this chapter."

tion that rejection of the labor contract will assist in the achievement of a satisfactory reorganization.

Despite the explicit recognition of the favored status of unionized employees and the substantial measure of protection given employee rights in the Third Circuit's formulation, the Petitioners argue that this carefully balanced approach fails to go far enough to protect the interests of organized labor. Both the Union and the Board urge upon this Court a standard under which a collective bargaining agreement cannot be rejected absent a showing that a failure to permit rejection will inevitably result in the liquidation of the debtor. Such a test, however, is contrary to the letter and spirit of the Bankruptcy Code, unduly promotes the interests of unionized employees over the interests of the debtor's other creditors, and goes well beyond what is rationally required to balance the competing policies of the Bankruptcy Code and the NLRA. In addition, as the court below noted, the difficulty of predicting the prospects for reorganization during the early stages of a Chapter 11 proceeding renders the test espoused by petitioner unworkable. The evidentiary burden this test would impose on a debtor in possession is, moreover, likely to work to the dertiment of employees by forcing numerous enterprises into liquidation.

In enacting Section 365, Congress did not single out collective bargaining agreements for special treatment. This omission is significant in view of the detailed exceptions to and conditions on rejection or assumption of specific types of executory contracts such as commodity futures contracts and shopping center leases.

Moreover, in Section 1167 of the Bankruptcy Code Congress explicitly restricted the right of a debtor in possession or trustee to reject labor agreements governed

by the Railway Labor Act ("RLA").[3] Its failure to enact similar restrictions on rejection of agreements covered by the NLRA leads to the logical conclusion that Congress intended such agreements to be treated in a manner similar to other executory contracts.

The Union and the Board attempt to read into Congressional silence a tacit codification of the holding in *Brotherhood of Railway Airline and Steamship Clerks* v. *REA Express, Inc.*, 523 F.2d 164 (2d Cir.) *cert. denied*, 423 U.S. 1017 (1975), which adopted a standard for rejection of labor agreements under Section 313(1) of the former Bankruptcy Act, former 11 U.S.C. §713(1), similar to that advocated by petitioners.[4] This attempt, however, does not withstand analysis. Petitioners argument is premised upon the holdings in *Lorillard* v. *Pons*, 434 U.S. 575 (1978), *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979) and *NLRB* v. *Gullet Gin Co.*, 340 U.S. 361 (1951). These cases hold that by reenacting a

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[3] Section 1167 provides:

> "Collective bargaining agreements. Notwithstanding section 365 of this title, neither the court nor the trustee may change the wages or working conditions of employees of the debtor establshied by a collective bargaining agreement that is subject to the Railway Labor Act (45 U.S.C. 151 et seq.) except in accordance with section 6 of such Act (45 U.S.C. 156)."

[4] Section 313(1) of the former Bankruptcy Act provided:

> "Upon the filing of a petition, the court may, in addition to the jurisdiction, powers and duties hereinabove and elsewere in this chapter conferred and imposed upon it—
>
> (1) permit the rejection of executory contracts of the debtor, upon notice to the parties of such contracts and to such other parties in interest as the court may designate."

statute without substantial change Congress is generally deemed to have codified existing case law interpreting the statute.

A comparison of former Section 313(1) and Section 365 reveals that the present section is fundamentally different from its predecessor. Fleshing out the bare bones of the former provision, Congress included an extensive list of exceptions to the trustee's power to reject, assume or assign executory contracts. Section 365 is clearly the product of careful Congressional analysis of the issue of assumption and rejection rather than a reenactment without substantial change. No inference can therefore be drawn that Congress intended to codify decisional law concerning the rejection of collective bargaining agreements under former Section 313(1).

Prior to the enactment of the Bankruptcy Reform Act of 1978 only one circut court of appeals had addressed the standard governing rejection of a collective bargaining agreement by a trustee or debtor in possession. In *Shopmen's Local Union No. 455* v. *Kevin Steel Products, Inc.*, 519 F.2d 698, 707 (2d Cir. 1975), decided in July, 1975, the Second Circuit held that permission to reject collective bargaining agreements should be granted "only after thorough scrutiny, and a balancing of the equities on both sides."

In August, 1975, the Second Circuit decided the case of *Brotherhood of Railway Airline and Steamship Clerks* v. *REA Express, Inc., supra,* which involved the right of a debtor in possession to reject a labor agreement governed by the Railway Labor Act, 45 U.S.C. §151 *et seq.*

Without explicitly explaining its reasons for apparently diverging from the balancing of the equities standard, which it had articulated the previous month in *Kevin Steel,* the court declared that rejection should be permitted only

if it can be clearly demonstrated that absent rejection the debtor will collapse and the employees will be without jobs. (*id.* at 172).

The failure of Congress to codify the *REA Express* standard, despite its extensive revision of the law relating to executory contracts, argues strongly for the conclusion that Congress did not intend that the *REA* test would control cases decided under Section 365. Moreover, while overlooked by Petitioners and indeed by the district and bankruptcy courts which have followed and expanded the decision in *REA Express,* that case did not involve a collective bargaining agreement subject to the NLRA, but rather an agreement subject to the RLA. In *Kevin Steel, supra* at 705, the Second Circuit had itself noted that "the distinct problems of [employees covered by the RLA] and their importance to the national economy are well recognized . . . and are highlighted by the differences between the Railway Labor Act and the National Labor Relations Act."

In enacting Section 1167 of the Bankruptcy Code, Congress recognized these differences and provided for special treatment of contracts subject to the RLA. The fact that in *Kevin Steel* and *REA Express* the Second Circuit was dealing with labor contracts governed by separate and distinct statutes may explain the different standards applied by the court in decisions rendered only one month apart.

It is also significant that the only other circuit court of appeals to rule on the issue of rejection of collective bargaining agreements under Section 365 adopted the balancing test formulated by the court below. In *In re Brada Miller Freight System, Inc.,* 702 F.2d 890, 899 (11th Cir. 1983), the Eleventh Circuit stated:

> "We agree with the *Bildisco* court, particularly with regard to its latter conclusion that the test of *REA*

> *Express* imposes an excessive burden on the debtor-in-possession, one that subordinates the myriad of diverse interests at stake to a single issue: the ability of the debtor-in-possession to show by a preponderance of the evidence that forced liquidation is a certainty absent a rejection of the collective bargaining agreement. We find, as did the *Bildisco* court, that the *Kevin Steel* balancing of the equities test provides a more satisfactory accommodation of the conflicting interests at stake in a rejection proceeding."

As both the *Bildisco* and *Brada Miller* decisions recognize, a Chapter 11 proceeding contemplates and permits the adjustment and restructuring of the rights of all creditors and shareholders in order to achieve the rehabilitation of financially distressed business entities. As stated by the Committee on the Judiciary of the House of Representatives:

> "The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders. The premise of a business reorganization is that assets that are used for production in the industry for which they were designed are more valuable than those same assets sold for scrap. Often, the return on assets that a business can produce is inadequate to compensate those who have invested in the business. Cash flow problems may develop, and require creditors of the business, both trade creditors and long-term lenders, to wait for payment of their claims. If the business can extend or reduce its debts, it often can be returned to a viable state. It is more eco-

> nomically efficient to reorganize than to liquidate, because it preserves jobs and assets."
>
> H.R. Rep. No. 95-595, 95th Cong., 1st Sess., 320 (1977)

The Judiciary Committee further pointed out that unlike an out-of-court settlement with creditors, a reorganization under the bankruptcy laws is binding upon nonconsenting creditors and thus permits a more substantial restructuring of a debtor's finances (*id.*).

The restructuring of the debtor's finances under a Chapter 11 plan, however, is not designed to favor the interests of one group of creditors over those of other groups. Rather, the long-standing federal policy requires that a Chapter 11 plan not unfairly discriminate among creditors. As this Court noted in *Young* v. *Higbee Co.*, 324 U.S. 204, 210 (1945), one of the prime purposes of the bankruptcy laws has historically been to ratably distribute the assets of the bankrupt among creditors, and to protect creditors from one another.

The policy of equality of treatment is embodied in several substantive provisions of Chapter 11. Sections 1122(a), 11 U.S.C. §1122(a), and 1123(a)(4), 11 U.S.C. 1123(a)(4), require that a plan of reorganization place claims of a similar nature in the same class and provide the same treatment for each claim in a particular class.[5]

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[5] Section 1122(a) provides:

> "Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class."

(Footnote continued on following page)

Similarly, Section 1129(b)(1), 11 U.S.C. 1129(b)(1), provides that a plan of reorganization should be confirmed even in the absence of acceptance by the requisite number of creditors if the court finds that the plan does not discriminate unfairly and is fair and equitable with respect to non-accepting classes.[6]

The test espoused by the Petitioners clearly runs afoul of the fundamental bankruptcy policy of requiring all creditors to share equally in the sacrifices required to achieve a successful reorganization. In many instances a debtor might be able to leave the rights of employees untouched and still avoid liquidation by requiring other classes of creditors to forfeit all or a substantial portion of their claims and interests. Requiring that other creditors accept the full brunt of economic sacrifice so that unionized employees can escape unscathed from the

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(Footnote continued from preceding page)

Section 1123(a)(4) provides:

> "(a) A plan shall—
>
> (4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;"

[6] Section 1129(b)(1) provides:

> "Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan."

debtor's restructuring of its finances, however, is so contrary to the design of Chapter 11 and so manifestly inequitable that it should not be tolerated short of a clear and unequivocal expression by Congress of such an intent.

The test enunciated by the court below is expressly designed to foster financial rehabilitation but at the same time to balance the hardships to be borne by all classes of creditors. Special recognition of the rights of organized labor, however, is a fundamental element in the Third Circuit's balancing approach thus assuring that the policies underlying the NLRA are afforded sufficient protection within the context of a reorganization.

As noted in both the decision below and the opinion in *Brada Miller,* each Chapter 11 proceeding will involve its own equation of hardships and equities to be considered and balanced by the bankruptcy court to insure that the rights of particular classes of creditors, including unionized employees, are not unduly forfeited in order to achieve a successful reorganization. An inflexible rule such as that proposed by the petitioners is therefore clearly unwise and inappropriate. Rather, a requirement that the courts weigh the competing equities on a case by case basis utilizing the general guidelines established by the court below represents the most sensible and logical approach to reconciling the competing interests of organized labor, the debtor, and its creditors.

The major thrust of the Union's argument is nothing more than the contention that the rejection of a collective bargaining agreement will result in the deprivation of certain employee rights. While this is undoubtedly true, it is also true that Chapter 11, by its very nature, may result in the deprivation of rights and claims by all those who have business relations with the debtor.

In holding that a labor contract cannot be rejected merely upon a showing that such action would be beneficial to the debtor, as is the case with other executory contracts, and imposing instead the requirement that the debtor establish that the equities tip in favor of rejection and that rejection will assist the achievement of a satisfactory reorganization, the court below has assured that the rights of employees receive meaningful and substantial protection.

It is also clear that the Union vastly overstates the potential harm to employees as a result of rejection of labor agreements. Employees, in fact, are in a far better position to protect their interests than are most other creditor classes. Rejection of a collective bargaining agreement does not terminate the relationship between the union and debtor in possession. On the contrary, the debtor in possession must still recognize the union as the employees' bargaining representative and is required to negotiate with it with respect to the terms and conditions of employment. The employees retain their right to strike should negotiations fail. *In re Bildisco, supra* at 60.

Given the crippling impact of a strike on a debtor's already distressed financial condition, the union can expect that a debtor in possession will be disposed to accommodate a union's reasonable demands. In addition, the very threat of a strike will be sufficient in most instances to prevent a debtor in possession from seeking rejection unless it is convinced tht such action is essential for the survival and reorganization of its business. A stated in *Kevin Steel, supra* at 70, in a reorganization proceeding "which is designed to preserve a going business, only a hardy—some might say foolhardy—

employer would provoke a strike by trying to terminate an existing labor contract."

Further protection of employee rights is found at Section 502(c) of the Bankruptcy Code, 11 U.S.C. Section 502(c), which requires the bankruptcy court to estimate and allow even unliquidated and contingent employee claims resulting from rejection of a labor contract.[7] Indeed, the court below noted that the relief available to employees through the claims procedure was one element to be considered in balancing the equities. *In re Bildisco, supra* at 80.

The Third Circuit also correctly pointed out that the test advanced by Petitioners is impractical and unworkable given the difficulty if not impossibility of predicting with any accuracy, at least in the early stages of a reorganization case, whether rejection of a labor contract is the only alternative to liquidation. Congress has recognized that in most Chapter 11 proceedings a quick determination of the feasibility of a plan of reorganization is not possible. Thus no time limit is placed upon the debtor in which a plan must be submitted. On the contrary, Section 1121(a) of the Bankruptcy Code, 11 U.S.C. §1121(a), provides that the debtor in possession may file a plan at any time.

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[7] Section 502(c) provides:

> "(c) There shall be estimated for purpose of allowance under this section—
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> (1) any contingent or unliquidated claim, fixing or liquidation of which, as the case may be, would unduly delay the closing of the case; or
>
> (2) any right to an equitable remedy breach of performance if such breach gives rise to a right to payment."

While the Code makes reference to the requirement that a debtor file a statement of affairs and schedules of assets and liabilities at the outset of a Chapter 11 case, the information contained therein is unlikely to assist the court in analyzing the prospects of a successful reorganization. Debtors in possesion customarily utilize the breathing spell provided by Chapter 11 to substantially restructure their methods of operation in an attempt to increase efficiency and curtail losses. Even after this restructuring is accomplished it may take a protracted period of time for the results to be felt and analyzed. In addition, the very filing of a Chapter 11 petition often results in at least an initial curtailment of operating revenues, since many vendors customarily refuse to provide credit and customers may be unwilling to place orders due to their uncertainty as the debtor's ability to perform.

A debtor in possession may therefore be unable to accurately forecast its operating revenues until results of restructuring and the impact of the Chapter 11 filing become known. Any attempt to assess the impact of a collective bargaining agreement on the ability of the debtor in possession to continue to operate is virtually impossible until its operations have stabilized to the point of permitting the court to make valid findings with respect to projected operating revenues and profits. Under the test advocated by Petitioners, therefore, the debtor in possession would in many instances be unable to meet its evidentiary burden at any early stage in the proceedings and be forced to adopt a labor agreement which ultimately proves so onerous and burdensome as to render a successful reorganization impossible.

The standard adopted by the Third Circuit avoids this result while at the same time assuring that rejection of

labor contracts will not be lightly permitted and that the impact of rejection on covered employees will be given due regard in the court's determination.[8]

POINT II

Policy considerations and controlling legal principles dictate that a debtor in possession may seek permission to reject a collective bargaining agreement without first complying with the bargaining requirements for mid-term contract modification contained in Section 8(d) of the NLRA.

In addition to challenging the test formulated by the court below for rejection of labor agreements, the Union contends that as a precondition to rejection, a debtor in possession must be required to comply with the bargaining requirement for mid-term contract modification set forth in Section 8(d) of the NLRA, 29 U.S.C. §158(d). The Union argues that the effect of the Third Circuit's ruling is to free a debtor in possession from its obligation under a collective bargaining agreement merely upon the filing of a Chapter 11 petition. This argument completely misperceives the impact of the Third Circuit's decision.

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[8] The fears voiced by the Union that the test formulated by the Third Circuit will encourage solvent employers to file Chapter 11 petitions in a bad faith attempt to rid themselves of the obligations imposed by collective bargaining agreements are groundless. It is unlikely that many solvent businesses will subject themselves to the strict creditor scrutiny and court control which Chapter 11 imposes merely in an attempt to escape the terms of labor agreements. Moreover, as a court of equity, the bankruptcy court has the inherent equitable power to dismiss a Chapter 11 petition upon a finding that it has been filed in bad faith. See 11 U.S.C. §1112(b); *In re G-2 Realty Trust*, 6 B.R. 549, 552 (B. Ct. D. Mass. 1980).

The ruling of the court below was based upon the theory first articulated by the court in *Kevin Steel, supra* at 704, and reiterated in *REA Express, supra* at 171, that the debtor in possession is a "new entity created with its own rights and duties, subject to the supervision of the bankruptcy court." Because the debtor in possession is not a party to the collective bargaining agreement, it is not obligated to bargain over modifications in the terms of employment but is free to set its own initial terms and conditions.

The determination that a debtor in possession is a new entity is consistent with the provisions of the Bankruptcy Code and with generally recognized principles relating to executory contracts. Under Section 1107 of the Code, 11 U.S.C. §1107, a debtor in possession is granted rights and responsibilities equivalent to those of a bankruptcy trustee. Unlike the pre-Chapter 11 debtor, the debtor in possession cannot operate its business merely for its own benefit but is charged with a fiduciary duty towards its creditors. In managing its business the debtor in possession is also subject to the supervision of the bankruptcy court.

The power to reject executory contracts is an extension of the principle that a trustee in bankruptcy may abandon burdensome property. In order to prevent bankrupt estates from being saddled with onerous contractual liabilities, the courts developed a doctrine under which title to an executory contract did not immediately vest in the trustee, but rather vested only upon the trustee's affirmative adoption of the contract. This principle was premised on the recognition that executory contracts involve financial obligations, as well as benefits, and that the bankrupt estate should not be charged with such obligations unless they were clearly assumed by the trustee after careful deliberation. 2 *Collier on Bankruptcy*, ¶365.01, pp. 365-6-365-8 (15th ed.).

A trustee or debtor in possession does not automatically become liable to perform the terms and conditions of the debtor's executory contracts upon the filing of a reorganization petition. Rather, such a result follows only upon the trustee's or debtor in possession's affirmative adoption of a contract. *Sunflower Oil Co.* v. *Wilson,* 142 U.S. 313, 322 (1892), *In re Northern Indiana Oil Co.,* 180 F.2d 669, 675 (7th Cir. 1950), *cert. denied* 340 U.S. 883; *Pacific Western Oil Co.* v. *McDuffie,* 69 F.2d 208, 213 (9th Cir. 1934), *cert. denied* 203 U.S. 568; *In re Rochester Shipbuilding Corp.,* 32 F.Supp. 98 (W.D.N.Y. 1940). The trustee or debtor in possession is afforded this breathing spell for the express purpose of protecting the bankrupt's estate from claims arising from a failure to perform subsequent to the date of filing. *In re McCormick Lumber & Mfg. Corp.,* 144 F.Supp. 804, 805 (D.Or. 1956).

The Union's argument that the effect of the Third Circuit's ruling is to release the debtor in possession from the obligations imposed by a collective bargaining agreement upon the filing of a Chapter 11 petition clearly misconstrues the controlling law. The filing of the petition itself does not terminate a labor agreement, but as in the case with other executory contracts, places it in a period of suspension pending the debtor in possession's decision to seek assumption or rejection.[9]

The debtor in possesion's initial freedom from complying with the terms of a collective bargaining agreement strongly supports the validity of the analogy drawn by the Third Circuit between a debtor in possession and a successor employer. Citing this Court's holding in *NLRB* v.

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[9] The effect of assumption or rejection on rights accruing under a collective bargaining agreement in this interim period are discussed at Point III, *infra.*

Burns Security Services, Inc., 406 U.S. 272 (1972), the Third Circuit concluded that, as in the case with a successor employer, a debtor in possession may be required to recognize and bargain with the union, but is not a party to the agreement unless it affirmatively assumes the labor contract.

In *Burns, supra* at 287, this Court rejected the argument of the NLRB that a successor employer is necessarily bound by the substantive terms and conditions of its predecessor's collective bargaining agreement. In holding that the successor employer in that case was not so bound, the Court emphasized that nothing in the new employer's actions indicated that it was assuming the obligations of the contract.

The Court further noted that a successor must be free to set the initial terms and conditions of employment in order to promote rehabilitation of failing businesses. As stated at pages 287-288 of the *Burns* decision:

> "A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital."

The analogy between a debtor in possession and a successor employer was applied by the Second Circuit in the *Kevin Steel* decision, *supra* at 704. In *REA Express, supra* at 170-171, the Second Circuit made the same analogy and expounded its rationale. Pointing out that

the *Burns* decision was premised on policy considerations designed to encourage efforts to revive failing business enterprises, the court noted that these considerations were particularly applicable to the efforts of a trustee or debtor in possession to stave off liquidation. Automatically imposing onerous employment conditions on the debtor in possession pending the protracted negotiations required by the labor laws would, the Court pointed out, undoubtedly force many financially distressed enterprises out of business, terminating the jobs of all of its employees.[10]

In *Local Joint Executive Board* v. *Hotel Circle, Inc.*, 613 F.2d 210, 214 (9th Cir. 1980), the Ninth Circuit also found the successorship analogy persuasive. The court noted that the policy of allowing a debtor in possession a new start "provides an even stronger reason for not automatically imposing the existing labor agreement than does the policy recognized in *Burns* of encouraging the free flow of capital."

The Petitioners correctly point out that the *Burns* holding does not foreclose the imposition of the substantive terms of a predecessor's collective bargaining agreement upon the successor employer in all cases. As this Court indicated at page 291 of the *Burns* decision, in certain circumstances the Board might find as a matter

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[10] Imposing the terms of a collective bargaining agreement on a debtor in possession in circumstances where a successor employer would not be bound would also encourage existing ownership to sell the business rather than to accomplish its reorganization under Chapter 11. The result is directly at odds with the policy of promoting the rehabilitation of existing businesses and is highly prejudicial to shareholders of ailing business enterprises who would be forced to sell their interests, presumably at a distress prices, rather than to attempt to accomplish its reorganization.

of fact from the successor's conduct that it has assumed the predecessor's obligations under the predecessor's labor contract. The Court was careful to point out that "[s]uch a duty does not, however, ensue as a matter of law from the mere fact that the employer is doing the same work in the same place with the same employees as his predecessor."

In *Howard Johnson Co., Inc.* v. *Detroit Local Joint Executive Board,* 417 U.S. 249, 256 (1974) this Court considered whether a successor employer was required to arbitrate the extent of its obligations to the predecessor's employees. Finding that no such duty existed, the Court again emphasized the appropriateness of a case-by-case approach to the issue of a successor's liability and indicated that, in addition to the factual circumstances of each case, the legal context in which it arises is an important consideration.

The principles espoused in the *Burns* and *Howard Johnson* decisions underscore the invalidity of the Petitioners' assertion that, because a debtor in possession normally conducts the same work as the debtor and employs the same work force, it should be bound by the terms of the debtor's collective bargaining agreement. These decisions make clear that the identity of work performed and composition of the work force does not, as a matter of law, bind a successor to the obligations arising under a labor agreement. Such liability will only be imposed if the factual circumstances and the legal context of a particular case warrant the conclusion that the successor either expressly or by its conduct has assumed its predecessor's agreement.

In the legal context of a Chapter 11 proceeding, the conclusion that a debtor in possession has by its conduct

assumed the terms of the debtor's labor contract will rarely be justified. Section 365(g)(1) of the Bankruptcy Code expressly prohibits a debtor in possession or trustee from tacitly approving an executory contract. The statute is clear that asumption of such agreements can only be accomplished with the formal approval of the bankruptcy court. See *In re Price Chopper Supermarkets, Inc.*, 19 B.R. 462, 466-67 (B.Ct. S.D. Cal. 1982).

Even the trustee's partial performance of his obligations under an executory agreement is not sufficient to bind him, absent court approval. As stated in *Pacific Western Oil Co.* v. *McDuffie, supra* at 213, a trustee may, with court approval, perform some part of an executory contract on an experimental basis pending his decision to adopt or reject it. In order for the trustee to become bound by the contract, however, he must positively assume it under the direction of the court.

The fact that a debtor in possession is not required to comply with Section 8(d) of the NLRA prior to seeking permission to reject a labor agreement does not leave a union powerless to protect its members' interests. A debtor in possession is an "employer" under the express terms of Section 2 of the NLRA, 29 U.S.C. §152, and, as the court below noted, is required to recognize and bargain with the union over the terms and conditions of employment. The employees may strike should negotiations fail.

A union also need not wait indefinitely for a debtor in possession to make an election as to assumption or rejection. Under Section 365(d)(2) of the Bankruptcy Code a union has the right to request that the bankruptcy court establish a time certain by which a debtor in possession must move to assume or reject a collective bargaining agreement.

Public policy considerations militate so strongly against requiring a debtor in possession to comply with Section 8(d) that even the NLRB is forced to disagree with the Union on this point. As the Board notes, requiring strict compliance with the formal notice provisions and waiting periods contained in Section 8(d) would prevent a debtor in possession from seeking prompt rejection of a collective bargaining agreement even in those cases where adherence to the contract presents an imminent threat to the survival of the debtor's business. A debtor in possesssion must be free to move for rejection at the earliest possible date, and to set the initial terms of employment in order to insure that its right to reject is not rendered moot because the burdens imposed by the contract itself have forced the debtor into liquidation.[11]

Rather than imposing upon the debtor in possession the absolute obligation to bargain before seeking rejection, the sounder approach is to treat the willingness of the debtor in possession to bargain as one factor to be considered in balancing the equities when a debtor in possession applies for authorization to reject a labor agreement. This approach was explicitly sanctioned by the decision below which held that "the good or bad faith of the parties in dealing with the effect of the company's insolvency on its labor obligations" is among the factors bankruptcy courts might

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[11] Reference to Section 1167 of the Bankruptcy Code leads to the conclusion that Congress itself rejected the position advanced by the Union. This statute prohibits a bankruptcy trustee from changing the wages and working conditions of employees covered by the Railway Labor Act, except in accordance with the bargaining requirements contained in that statute. The failure of Congress to impose a similar prohibition with respect to employees covered by the NLRA indicates its decision not to require compliance with Section 8(d) as a pre-condition to rejection.

consider in balancing the equities. *In re Bildisco, supra,* at 80, n. 12.

In adopting an approach virtually identical to that of the court below, the Eleventh Circuit in the *Brada Miller* decision, *supra,* also refused to require a debtor in possession to commence the bargaining process prior to seeking rejection. The *Brada Miller* court also deemed it more prudent to treat the good faith of the debtor (and the union) as one factor to be considered in deciding an application to reject.

The Union alternatively proposes that a debtor in possession's efforts to negotiate with a union be deemed a "central and crucial consideration to be accorded substantial weight." This proposal is as ill-conceived as the imposition of Section 8(d) obligations. In weighing the competing equities, the bankruptcy court must be free to adopt a flexible approach capable of responding to the unique factual pattern which each application will present. Arbitrarily elevating one factor over all other pertinent considerations would unduly restrict the ability of the court to fashion a remedy appropriate under the particular facts and circumstances of each case.

POINT III

Because rejection of a collective bargaining agreement relates back to the date of the Chapter 11 petition, upon the entry of an order permitting rejection the Board is foreclosed from finding that a debtor in possession has committed an unfair labor practice by unilaterally changing terms and conditions of employment.

In appeal No. 82-818, the NLRB seeks review of the Third Circuit's denial of its application for enforcement of the order determining that the debtor in possession had violated Sections 8(a)(1) and 8(a)(5) of the NLRA, 29 U.S.C. §§158(a)(1) and 158(a)(5), by unilaterally changing the terms and conditions of employment. The court held that as a matter of law the debtor in possession is a new entity not a party to the labor agreement and thus not subject to its terms. Moreover, rejection of an executory contract relates back to the date of the filing of the Chapter 11. If on remand the bankrupcty court permits rejection, the court concluded that the Board will be bound by the determination that no labor contract existed subsequent to the Chapter 11 filing.

The Board premises its theory that a debtor in possession must adhere to the terms of an existing collective bargaining agreement on the conclusion that a debtor in possession is a mere "alter ego" of the debtor (NLRB's brief at 36-40). The alter ego theory, however, is totally inappropriate in the context of a Chapter 11 proceeding. As this Court noted in *Howard Johnson Co., Inc.* v. *Hotel Employees, supra* at 259 n. 5, a new employer will be deemed the "alter ego" of its predecessor when it is "merely a disguised continuance of the old employer" (citing *Southport Petroleum Co.* v. *NLRB,* 315 U.S. 100, 106 (1942)). As the Court further stated:

> "Such cases involve a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management. In these circumstances, the courts have had little difficulty holding that the successor is in reality the same employer and is subject to all the legal and contractual obligations of the predecessor. [citations omitted]"

The designation of a trustee or debtor in possession in a Chapter 11 case involves far more than a mere "technical change" in the structure and identity of the employer. On the contrary, it represents the replacement of the former employer by a fiduciary charged with administering the assets of the estate for the benefit of creditors and subject to the control of the court. A trustee or debtor in possession is armed with many legal rights and is subject to many legal obligations and controls totally new and distinct from the rights and duties of the pre-bankruptcy company. Among these rights are the power to avoid preferential and fraudulent transfers, even if made or permitted by the pre-bankruptcy entity (11 U.S.C. §§547, 548), the rights of a lien creditor and a bona fide purchaser of real property (11 U.S.C. §544), the right to avoid certain statutory liens (11 U.S.C. §545), the right to abandon burdensome property (11 U.S.C. §554) and the very right here at issue to reject executory contracts.

Among the restrictions imposed upon a trustee or debtor in possession are the requirements to obtain court approval for the retention of professionals (11 U.S.C. §327), for the use, sale or lease of property other than in the ordinary course of business (11 U.S.C. §363), and for obtaining credit (11 U.S.C. §365).

Although a debtor in possession may be operated by the same management as the pre-bankruptcy company, its rights and duties are so altered by the filing of the Chapter 11 petition that the new entity theory adopted by the court below correctly describes its legal status, at least in the context of its rights with respect to executory contracts.[12]

The Board's contention that a debtor in possession commits unfair labor practices by changing the terms and conditions of employment is necessarily premised on the assumption that a debtor in possession is bound by the provisions of the debtor's collective bargaining agreement until the contract is rejected. As pointed out at Point II, *supra*, this proposition is totally contrary to controlling law. The filing of a Chapter 11 petition places executory contracts in suspension to afford the debtor in possession a reasonable period of time in which to evaluate whether the benefits conferred by the contract outweigh the burdens. Prior to adoption of the contract a debtor in possession is not required to perform its terms.

A logical and necessary corollary of this principle is that when rejection is permitted, it is deemed to relate back to the date of the filing of the Chapter 11 petition. Section 365(g)(1) of the Bankruptcy Code, 11 U.S.C. §365(g)(1) expresses this result by declaring that disaffirmance of a

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[12] Contrary to Petitioner's assertion, there is no logical inconsistency in holding on the one hand that a debtor in possession is not bound by the collective bargaining agreement and on the other that it has the right to apply for rejection or assumption of the contract. Such a proposition is entirely in accord with the long-standing judicial doctrine, analyzed at Point II, *supra*, that while the filing of a reorganization petition does not terminate an executory contract, it does suspend its enforcement pending the trustee's decision to assume or reject.

contract constitutes a breach immediately before the date of the filing of the petition. If an executory contract is successfully rejected, therefore, the debtor in possession is relieved from performing all contractual obligations arising subsequent to the date of the Chapter 11 petition. The other party to the contract cannot enforce contractual liabilities against the estate but is limited to filing a claim as a general creditor for damages stemming from the rejection. *In re North Atlantic and Gulf Steamship Co.*, 204 F.Supp. 899, 909 (S.D.N.Y. 1962), *aff'd sub nom. Schilling* v. *A/S/D/S Dannebrog*, 320 F.2d 628 (2d Cir. 1963); *In re McCormick Lumber & Mfg. Corp supra* at 805 (D.Or. 1956); *In re Price Chopper Supermarkets, Inc.*, 19 B.R. 462, 467 (B.Ct. S.D. Cal. 1982); *In re Rovine Corp.*, 6 B.R. 661, 666 (B.Ct. W.D. Tenn 1980); *In re Middleton*, 3 BR. 610 (B. Ct. E.D. Pa. 1980).

This is not to say that the other party to the contract is not entitled to compensation for any performance on its part in the interim period between the Chapter 11 filing and the date of rejection. Because a debtor in possession is not bound by the contract unless it is adopted, however, the right to receive compensation for benefits conferred is not based upon the debtor in possession's contractual liabilities but instead is an equitable right based upon the reasonable value of the benefits conferred. *Philadelphia Co.* v. *Dipple*, 312 U.S. 168, 174 (1941); *In re Fredrick Meats, Inc.*, 483 F.2d 951, 952 (9th Cir. 1973); *American A. & B. Coal Corp.* v. *Leonardo Arrivabene, S.A.*, 280 F.2d 119, 124 (2d Cir. 1960); *In re Chicago Rapid Transit Co.*, 129 F.2d (7th Cir. 1942), *cert. denied* 317 U.S. 683; *In re United Cigar Stores Co.*, 69 F.2d 513, 515 (2d Cir. 1934), *cert. denied* sub nom.; *Reisinwebers, Inc.* v. *Irving Trust Co.*, 293 U.S. 566; *In re Price Chopper Supermarkets, Inc., supra* at 467.

The principle that rejection of an executory contract is retroactive to the date of the Chapter 11 is clearly required to give effect to the policy considerations upon which the entire doctrine of rejection is based—the recognition that a bankrupt estate should not be burdened with contractual obligations which outweigh the benefits to be derived from the contract. The Board's contention that a debtor in possession is bound by the terms of an existing labor agreement until the contract is disaffirmed subverts this policy and would impose upon the debtor in possession the very burdens Section 365 is designed to remove.

Congress and the courts have also recognized that a debtor in possession requires a reasonable period of time to properly evaluate whether assumption of an executory contract is in the best interest of the estate. In contrast to Section 365(d)(1) of the Bankruptcy Code, 11 U.S.C. §365(d)(1), which provides that in a Chapter 7 liquidation proceeding an executory contract will be deemed rejected sixty days after the filing of a petition unless the trustee assumes it, Section 365(d)(2) provides that a trustee may assume or reject a contract at any time prior to confirmation of a plan. See also, 2 *Collier on Bankruptcy*, ¶365.03, p. 365.20 (15th ed.).

The financial pressure exerted on a debtor in possession by the continuing accrual of contractual obligations during the period in which it is evaluating the benefits and burdens of a collective bargaining agreement would severely impede the debtor in possession's ability to make a reasoned and prudent judgment as to the value of the contract. Such pressure is likely to result in the early rejection of numerous labor contracts which would otherwise have been assumed had the debtor in possession been free to deliberate in an unhurried fashion.

As the above analysis makes clear the entry of an order authorizing the rejection of a collective bargaining agreement results as a matter of law in the determination that the debtor in possession was not bound by the agreement subsequent to the filing of the Chapter 11 petition. The NLRB in such circumstances is thus foreclosed from finding that the debtor in possession's unilateral changes in the terms and conditions of the agreement constitute an unfair labor practice.[13]

Neither the debtor in possesssion's initial freedom to fix the terms and conditions of employment nor the retroactive effect of an order authorizing rejection of a labor contract results in the drastic prejudice to employee rights envisioned by the Petitioners. Although not bound by the terms of a pre-existing collective bargaining contract, the debtor in possession is nevertheless obligated to recognize its employee's union and bargain in good faith over the terms and conditions of employment. Thus the union is free, immediately upon the filing of an employer's Chapter 11 petition, to demand that the debtor in possession commence the bargaining process.

Even if the debtor in possession takes no immediate steps to alter the terms and conditions of employment, only the most sanguine union representative will be led to conclude that the employees may not at some point in the proceedings be called upon to sacrifice certain rights and bene-

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[13] The result is quite different when a collective bargaining agreement is assumed. Assumption, like rejection, is deemed retroactive to the date of the Chapter 11 petition and by assuming an executory contract a debtor in possession obligates itself to fully perform all of the terms of the contract as if bankruptcy had not intervened. *American A. & B. Coal Corp.* v. *Leonardo Arrivabene, S.A., supra* at 124; *In re Italian Cook Oil Corp.*, 190 F.2d 994, 996-7 (3d Cir. 1951).

fits in order to render a successful reorganization possible. The filing of the Chapter 11 petition itself should serve as a clear signal to the employees and their bargaining representatives that changes in the terms and conditions of employment may well be sought by the debtor in possession. See *B.R.A.C.* v. *REA Express, Inc., supra,* at 171. A union which chooses to bury its head in the sand rather than to aggressively pursue negotiations with the debtor in possession as to post-Chapter 11 terms of employment has no legitimate complaint that its members continued to work in reliance upon the belief that the debtor in possession would adhere to the terms of the collective bargaining agreement.

The debtor in possession is not free to unilaterally control the timing of its election to assume or reject a labor agreement. Unions and the Board have the right to apply to the court pursuant to Section 365(d)(2) of the Bankruptcy Code, 11 U.S.C. §365(d)(2), for an order requiring the debtor in possession to make such a determination within a specified period of time.[14] By diligently pursuing its right to negotiate and, if necessary, by seeking relief pursuant to Section 365(d)(2) a union has ample means to protect the interests of its membership.

Even in those cases in which protracted period elapses between the Chapter 11 filing and the entry of an order permitting rejection of a collective bargaining agreement, the retroactive effect of rejection does not deprive covered employees of their right to just compensation for services rendered. Employees performing work during a reorgani-

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[14] In determining what constitutes a reasonable period of time, the factors to be considered include the nature of the interests at stake, the balance of harm, the good to be achieved and the safeguards to the parties. *Theatre Holding Corp.* v. *Mauro,* 17 B.R. 430, 431 (S.D.N.Y. 1980), aff'd 681 F.2d 102 (2d Cir.).

zation are entitled to receive compensation based upon the fair market value of the services provided. If wages and benefits paid by the debtor in possession are determined to be less than fair, the employees have the right to assert claims for the true value of their services, which claims will be accorded first priority treatment as costs of administration. *In re Capital Service,* 136 F.Supp. 430, 438 (S.D. Cal. 1955); *In re Price Chopper Supermarkets, Inc., supra* at 467.

The specter of employees continuing to work for a debtor in possession only to find that they will not be adequately compensated for their services following a rejection of their labor contract vanishes when exposed to the light of these controlling legal principles. As a court of equity, the bankruptcy court has the duty and power to insure fair treatment to employees of the debtor in possession.

CONCLUSION

For all of the foregoing reasons it is respectfully submitted that the judgment of the Court of Appeals in these matters should be affirmed in all respects.

Respectfully submitted,

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Nos. 82-818 and 82-852

In the Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION, ET AL.

LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ETC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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NLRB v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 7
Pacific Western Oil Co. v. *McDuffie*, 69 F.2d 208, cert. denied, 293 U.S. 568 16

Cases—Continued — Page

Philadelphia Co. v. *Dipple*, 312 U.S. 168 16
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Reading Co. v. *Brown*, 391 U.S. 471 3
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Sunflower Oil Co. v. *Wilson*, 142 U.S. 313 15
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Statutes:

Bankruptcy Reform Act of 1978 (Bankruptcy Code), 11 U.S.C. 101 *et seq.*:
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Bordewieck & Countryman, *The Rejection of Collective Bargaining Agreements by Chapter 11 Debtors*, draft (to be published in American Bankruptcy Law Journal, October 1983).....4, 5, 9-10
2 *Collier on Bankruptcy* (L. King 15th ed. 1983).... 15, 17

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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1. Respondent Bildisco contends (Br. 21) that the Second Circuit's *Kevin Steel/REA Express* standard for rejection of a collective bargaining agreement "runs afoul of the fundamental bankruptcy policy of requiring all creditors to share equally in the sacrifices required to achieve a successful reorganization." It contends (Bildisco Br. 14-15) that the

test adopted by the court below is more balanced because it not only gives recognition to the rights of union employees under the national labor policy, but also considers "the claims and interests of the debtor's other creditors and make[s] a reasoned determination that rejection of the labor contract will assist in the achievement of a satisfactory reorganization." These contentions do not withstand analysis.

a. Bildisco's suggestion that the *Kevin Steel/REA Express* standard gives an unfair preference to employees represented by a union over other creditors is wide of the mark. This case does not involve the rights of bargaining unit employees as pre-petition creditors vis-a-vis the rights of other pre-petition creditors.[1] Rather, the issue before the Court is the nature of a debtor-in-possession's obligations under a collective bargaining agreement during the post-petition period.

Contrary to Bildisco's suggestion, the bankruptcy laws themselves support the conclusion that the interests of those who deal with the debtor-in-possession during the post-petition period take prece-

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[1] In situations in which the employer has failed to adhere to a collective bargaining agreement in the pre-petition period (as was the case with Bildisco), employees in the bargaining unit stand on no different footing than any other class of creditors with respect to their pre-petition claims against the employer. Section 507(a)(3) of the Bankruptcy Code, 11 U.S.C. 507(a)(3), accords third priority to wage claims up to $2,000 for the 90-day period immediately prior to the filing of the petition. The reorganization plan determines the extent to which the pre-petition claims of both the unit employees and all other creditors will be paid. Bildisco is simply wrong in contending (Br. 21-22) that if a bankruptcy court fails to permit rejection of a collective bargaining agreement unit employees (in contrast to all other classes of creditors) will escape "unscathed."

dence over the interests of pre-petition creditors. This is in keeping with the very purpose of the debtor-in-possession arrangement, which is to help the business survive by enabling it to incur obligations that will not be compromised by the debtor's prior financial difficulties. Thus, as this Court stated in *Reading Co.* v. *Brown*, 391 U.S. 471, 475 (1968), "the larger objective, common to arrangements, [is that] of operating the debtor's business with a view to rehabilitating it." Accordingly, the Bankruptcy Code provides that first priority is given to expenses of administration. See 11 U.S.C. 503, 507. And this Court in *Reading Co.* v. *Brown*, *supra*, generously interpreted such expenses, in recognition that those who deal with the debtor-in-possession in the post-petition period should not be required to sacrifice their interests to the interests of pre-petition creditors. The Court there held that claims for damages resulting from the negligence of the receiver during the post-petition period are expenses of administration entitled to priority. The Court explained (*id.* at 482-483):

> [I]n considering whether those injured by the operation of the business during an arrangement should share equally with, or recover ahead of, those for whose benefit the business is carried on, the latter seems more natural and just. Existing creditors are, to be sure, in a dilemma not of their own making, but there is no obvious reason why they should be allowed to attempt to escape that dilemma at the risk of imposing it on others equally innocent.

See also, *e.g.*, *In re Tucson Yellow Cab Co.*, 27 Bankr. 621, 623 (Bankr. 9th Cir. 1983) (employee claims under the National Labor Relations Act may

not be ignored "merely in order to permit unsecured creditors to obtain a satisfaction on their claims"); *In re Mammoth Mart, Inc.*, 536 F.2d 950, 954 (1st Cir. 1976) (fairness requires that any claims incident to the debtor-in-possession's operation of the business be paid before those of creditors for whose benefit the continued operation of the business is allowed).

Moreover, even the court below purported to recognize (82-818 Pet. App. 12a-13a) that the accommodation of bankruptcy policy to the national labor policy requires a higher standard for rejection of a collective bargaining agreement than for rejection of other types of executory contracts. Because a collective bargaining agreement may not be set aside merely because it would benefit the estate, employees covered by such an agreement receive more protection than creditors under normal commercial contracts. As a result, creditors with accrued claims may have to make sacrifices that employees covered by a collective bargaining agreement are not required to make. But in view of the need to accommodate the objectives of national labor policy, that result cannot be characterized as inconsistent with congressional intent. See Bordewieck & Countryman, *The Rejection of Collective Bargaining Agreements by Chapter 11 Debtors*, draft at 21-23 (to be published in the October 1983 issue of American Bankruptcy Law Journal) (hereinafter "Bordewieck and Countryman").[2]

b. The *Kevin Steel/REA Express* standard (described in our opening brief at pages 23-24) ensures

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[2] We are lodging copies of the draft article by Bordewieck and Countryman with the Court and providing copies to counsel for the parties and amici.

that a collective bargaining agreement will be set aside only for reasons of real economic necessity, *i.e.*, when it is demonstrably necessary to accomplish the bankruptcy policy goal of creating conditions that will forestall collapse of the business. The standard does not ignore the interests of either creditors or others who deal with the debtor-in-possession during the arrangement. If the debtor-in-possession is able to operate successfully under a collective bargaining agreement, creditors will be paid under the reorganization plan ultimately approved by the bankruptcy court. If the debtor-in-possession cannot operate successfully under the collective agreement, it may apply for rejection of the agreement at any point up to the time of adoption of the plan.[3]

Moreover, the *Kevin Steel/REA Express* standard does not require maximum sacrifices by nonunion employees or others with whom the debtor-in-possession deals as a prerequisite to rejection of a collective

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[3] Bildisco repeats the assertion, accepted by the court below (82-818 Pet. App. 14a-15a), that the *Kevin Steel/REA Express* standard is inadequate because it is difficult to predict at an early point whether a business will fail absent rejection of a collective bargaining agreement. Bildisco Br. 24-25. We explained in our opening brief (at 26) that this concern is entitled to little weight, since a debtor-in-possession may apply for rejection at any point during the proceeding, *i.e.*, whenever it becomes possible to make the necessary showing. As Bordewieck and Countryman point out, the difficulty of predicting success or failure at an early stage weighs in favor of a more stringent test for rejection of a collective bargaining agreement. "Permitting a bankruptcy court to reject a collective bargaining agreement because it cannot tell whether or not the reorganization is going to succeed effectively performs the delicate balancing of conflicting statutory objectives by placing a cinder block on the Bankruptcy Code side of the scale." Bordewieck & Countryman, *supra*, at 26.

bargaining agreement.[4] A debtor-in-possession need not make a showing that salaries and wages of managerial personnel or non-represented employees have been slashed to the bone or that the business would be crippled by cost-cutting measures. However, in circumstances in which labor costs of represented em-

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[4] Thus, the cases that have applied the *Kevin Steel/REA Express* standard and that were cited in our opening brief (at 24 n.13) did not involve a refusal to allow rejection on the ground that other creditors had not made the utmost sacrifice. Rather, the courts in those cases generally found that altering the terms of the collective bargaining agreement would not make the difference between success or failure. See, *e.g.*, *In re Connecticut Celery Co.*, 106 L.R.R.M. (BNA) 2847, 2852 (Bankr. D. Conn. 1980) (costs of union benefits were only three percent of operating expenses; submission by the debtor and confirmation of a plan that did not include rejection of collective bargaining agreement amounted to a concession that the requirements of the plan could be met without rejection); *In re Miles Machinery Co.*, No. 81-00388 (Bankr. E. D. Mich. June 17, 1982), slip op. 7-8 (factors such as bidding and pricing mechanisms, design and engineering costs, and number of customers, rather than labor costs, were identified as key to debtor's survival). In *In re David A. Rosow, Inc.*, 9 Bankr. 190 (Bankr. D. Conn. 1981), relied on by Amicus Curiae Chamber of Commerce (Br. 7-8), the court did not refuse rejection because further sacrifices could be extracted from the nonunion workforce. Rather, the court noted that rejection of the collective agreement would effect a savings of $636.17 per week and that operating expenses amounted to $100,000 per week and concluded that savings resulting from rejection would be *de minimis*. The court observed that the debtor had cut the wages and benefits of its 125 nonunion employees prior to filing its Chapter 11 petition, but rejected the debtor's argument that the wages of the 12 union employees must therefore be cut in a comparable manner. In addition, the court observed that no adjustment had been proposed in the debtor's rental payments of $15,000 per month to its sole stockholders. *Id.* at 193 n.6.

ployees do not constitute the overwhelming share of operating expenses, it is entirely appropriate to assess whether a successful reorganization could be accomplished by measures other than rejection of a collective bargaining agreement. The *Kevin Steel/REA Express* standard accordingly does require the bankruptcy court to determine whether the debtor-in-possession has taken whatever steps a reasonably prudent person would take to ensure viability before allowing rejection of the collective agreement. See, *e.g.*, *In re Blue Ribbon Transportation Co.*, BK No. 8300362 (Bankr. D.R.I. June 24, 1983) (court required debtor to cut excessive management salaries and cease maintaining seven automobiles for the personal use of management and their families as a condition to allowing rejection of the collective agreement).

It may well be that application of the *Kevin Steel/REA Express* standard results in securing the benefits of a collective bargaining agreement for employees in the bargaining unit, while others who work for, or deal with, the debtor-in-possession during the post-petition period are not similarly protected. But contrary to the contentions of Bildisco (Br. 14-16) and Amicus Curiae Chamber of Commerce (Br. 9-10), that result flows from the national labor policy fostering collective bargaining, not from any policy of favoring employees represented by a union over other employees. It is clear that the National Labor Relations Act accords rights and protections to employees under collective bargaining agreements that other employees may not have. See *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33-34, 42 (1937). It is a violation of the Act for an employer unilaterally to abrogate or modify a collective agreement, even if economic hardship dictates such a course. See

our opening brief at 16-18. Thus, an employer that has not filed a bankruptcy petition, but is suffering financial difficulties, may be able to change at will the terms of employment for employees not covered by a collective agreement, but it could not do so in the case of employees covered by such an agreement. This principle furthers the basic purpose of the Act—promotion of collective bargaining in order to "facilitate agreement in place of economic warfare." *Allied Chemical Workers Local Union No. 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 187 (1971). "Enforcement of the obligation to bargain collectively is crucial to the statutory scheme." *NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 402 (1952). See also *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 674 (1981).

This policy deserves weight in the context of bankruptcy proceedings, no less than in other contexts. The fact that bankruptcy proceedings are underway does not justify stripping employees represented by a union of the special statutory protection afforded to their collective bargaining rights merely because such protection is not enjoyed by other employees.[5]

c. The test adopted by the court below not only elevates the interests of pre-petition creditors in a manner not justified by bankruptcy policy; it also accords insufficient weight to the national labor policy

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[5] The assertion of Amicus Curiae Chamber of Commerce (Br. 9) that "the government should remain 'wholly neutral' as to whether or not employees should unionize and bargain collectively" is overstated. The Act is neutral with respect to whether employees should unionize. But once employees have chosen to do so, the Act is not neutral with regard to the obligation of employers to bargain with the employees' chosen representative and to refrain from destabilizing contractual relations.

by permitting rejection of collective bargaining agreements far too readily. Under the Third Circuit's test the bankruptcy court is to balance equities and make a "reasoned determination" that rejection will assist the debtor-in-possession in achieving a satisfactory reorganization (82-818 Pet. App. 17a). Such a showing no doubt could be made in most cases merely on the basis that it would be less costly or burdensome for an employer to operate without adhering to the collective agreement.

Recent cases indicate that bankruptcy courts that apply a test less stringent than the *Kevin Steel/REA Express* standard are inclined to grant rejection on what appear to be insubstantial grounds. For example, the court in *In re Reserve Roofing Florida, Inc.*, 21 Bankr. 96 (Bankr. M.D. Fla. 1982), in granting rejection under a balancing of the equities test, found it significant that the collective bargaining agreement required the debtor to "incur significant expenses which are not necessary to the performance of [its roofing] contracts." *Id.* at 98. As Bordewieck and Countryman note, consideration of whether a collective bargaining agreement is "necessary" to the debtor's operations flies in the face of the national labor policy:

> Given the NLRA and the policies underlying it, expenses stemming from a collective bargaining agreement advantageous to the union are indeed a "necessary" part of the business operation, whether the employer likes it or not. The fact that the union has struck a good deal does not mean that the costs of the collective bargaining agreement are not "necessary" because in an utterly non-union world cheaper labor would be available. The court's conclusion [in *Reserve Roofing Florida*] seems premised on the assump-

> tion that the non-union world furnishes the paradigm against which a debtor's position is to be compared. Given the fundamental labor policy that collective bargaining is *the* preferred method of employer/employee relations, such an assumption is untenable.

Bordewieck & Countryman, *supra*, at 40-41. See also *In re Ateco Equipment, Inc.*, 18 Bankr. 915, 916-917 (Bankr. W.D. Pa. 1982), in which the court allowed rejection because "savings" of $2,250 per month could be realized by not paying the contractual wage rate and because workers with seniority could be laid off "more easily."

The case of *In re Southern Electronics Co.*, 23 Bankr. 348 (Bankr. E.D. Tenn. 1982), illustrates well that in practice the application of a "flexible" test does not afford protection to the interests of the national labor policy. The bankruptcy court there allowed rejection of the collective bargaining agreement, expressly applying the test articulated by the court below. The court recognized that there was no contention or evidence that the economic terms of the agreement were "too costly to be sustained by the debtor" or that they had contributed to the bankruptcy. *Id.* at 359. However, the court found it significant that the debtor-in-possession wanted to be able to escape the seniority provisions of the agreement for the alleged purpose of improving production. The evidence indicated that the debtor-in-possession had never established objective production criteria, that the union made clear that it was willing to bargain about production problems and to permit discharge of employees who could be shown to be unproductive, and that the debtor-in-possession had not provided evidence of individual production perform-

ance to either the union or the bankruptcy court. *Id.* at 359-360.[6] The court nevertheless concluded that use of the contractual grievance procedures to resolve contentions that particular employees were unproductive would be "burdensome." *Id.* at 361.

The debtor-in-possession in *Southern Electronics* did not wait for court approval of rejection before disregarding the collective bargaining agreement. Initially it refused to bargain with the union. 23 Bankr. at 353. Soon after the bankruptcy court ordered the debtor-in-possession to abide by the collective bargaining agreement pending the court's determination whether to permit rejection, the debtor-in-possession discharged 14 allegedly underproductive employees and replaced them (but not in order of seniority) with 19 former employees who had been laid off. *Id.* at 354, 359. The debtor-in-possession did not notify the union of its proposal to reject the collective bargaining agreement until the court directed it to do so more than a month after the proposal was submitted. *Id.* at 362. The president of the debtor-in-possession had written to the union that his "main desire [was] to operate in a union free environment" and that "a union free environment is best for my style of management." *Id.* at 362-363. Despite the indications of bad faith on the part of the debtor-in-possession, the court concluded that rejection was proper on the ground that the president of the debtor-in-possession had insisted on making his earlier purchase of the capital stock of the company conditional on rejection of the collective bargaining

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[6] In addition, the evidence indicated that the debtor's difficulties were due not only to poor productivity, but also to lack of effective management. 23 Bankr. at 363.

agreement. *Id.* at 361, 363. The result in *Southern Electronics* can hardly be said to reflect recognition of the national labor policy.

2. Bildisco also contends that it did not violate Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), by its initiation or continuance of unilateral changes in the collective bargaining agreement during the post-petition period. It asserts (Br. 28, 37) that it was entitled to make such changes because, after filing a bankruptcy petition, a debtor-in-possession is not bound to comply with the debtor's executory contracts unless and until they are affirmatively adopted. Applicable precedent does not support that contention.

As we explained in our opening brief (at 47), it is well established that a debtor's contractual obligations continue to exist in the period following the filing of a reorganization petition. See also, *e.g.*, *In re Innkeepers of New Castle, Inc.*, 671 F.2d 221, 222, 226 (7th Cir. 1982), cert. denied, No. 82-221 (Oct. 12, 1982) (rejecting the contention that the non-debtor party to an executory contract was entitled only to a reasonable fee rather than to the contractual terms where the contract was neither assumed nor rejected until after the non-debtor party had performed his part of the contract); *Federal's, Inc.* v. *Edmonton Investment Co.*, 555 F.2d 577, 578-579 (6th Cir. 1977) (confirmation of reorganization plan did not discharge an executory contract that was not rejected). As the court explained in *Federal's*, 555 F.2d at 579, "this rule is consistent with the purpose of Chapter XI of enabling debtors to continue their business under court supervision."

Indeed, if Bildisco were correct that the mere filing of a reorganization petition allows a debtor to stop adhering to the terms of an executory contract, then

a non-debtor party to the contract similarly would be entitled to cease dealing with the debtor-in-possession. This result would be inconsistent with the scheme of the Bankruptcy Code, which expressly precludes modification or termination of an executory contract merely because a petition has been filed, a trustee has been appointed, or the financial condition of the debtor is poor. 11 U.S.C. 365(e)(1).[7] See also *In re Alfar Dairy, Inc.*, 458 F.2d 1258, 1261 (5th Cir.), cert. denied, 409 U.S. 1048 (1972) ("[a]ny other rule [than that executory contracts remain in effect] could result in chaos and injustice in bankruptcy proceedings"). Accordingly, the courts have held that collective bargaining agreements remain in effect during the post-petition period until rejected. *In re W. T. Grant Co.*, 620 F.2d 319, 321 (2d Cir.), cert. denied, 446 U.S. 983 (1980); *In re Public Ledger, Inc.*, 161 F.2d 762, 767 (3d Cir. 1947) (rejecting application of doctrine of "experimental assumption" and stating that "[t]he trustees could not seek and accept the benefits of the employment under the

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[7] Section 365(e)(1) of the Bankruptcy Code, 11 U.S.C. 365(e)(1), provides:

> Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on—
>
> (A) the insolvency or financial condition of the debtor at any time before the closing of the case;
>
> (B) the commencement of a case under this title; or
>
> (C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

favorable terms of the contract without for the time of enjoying them, accepting and yielding to terms deemed burdensome"); and see *In re Unishops, Inc.*, 553 F.2d 305, 308 (2d Cir. 1977); *In re Smith Jones, Inc.*, 17 Bankr. 126, 128 (Bankr. D. Minn. 1981).[8]

Bildisco urges (Br. 28) that it was not required to adhere to the collective bargaining agreement in the post-petition period because "[t]he trustee or debtor in possession is afforded [a] breathing spell for the express purpose of protecting the bankrupt's estate from claims arising from a failure to perform subsequent to the date of filing." It is true that the automatic stay provision of the Code, 11 U.S.C. 362, gives the debtor a breathing spell from claims of his creditors. However, the protection afforded to a debtor-in-possession is from actions taken by the non-debtor party arising from the debtor's failure to honor pre-petition claims, not from the debtor-in-possession's own failure to honor claims arising during the period of arrangement. "Claims or actions which arise after the commencement of the case are

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[8] In *Local Joint Executive Board* v. *Hotel Circle, Inc.*, 613 F.2d 210, 216-217 (9th Cir. 1980), the court held that a trustee could not affirmatively assume a collective bargaining agreement, so that the debtor's estate would be bound in the future, without the express permission of the bankruptcy court. However, the alleged assumption of the agreement in that case did not involve mere adherence to the terms of a contract; rather it involved the trustee's entry into negotiations for modification and extension of the agreement and adoption of the resulting wage increase and extension agreed on by a multi-employer group. The court did not indicate that the trustee would not be bound by the terms of an existing executory contract during the post-petition, pre-rejection period. Rather, its discussion suggests that the trustee would be so bound (*id.* at 217 n.4).

not included since such a stay would discourage others from dealing with the trustee." 2 *Collier on Bankruptcy* ¶ 362.04[1], at 362-28 (L. King 15th ed. 1983).[9]

The cases Bildisco relies on (Br. 28) do not support its contention that it was entitled to suspend the terms of the collective bargaining agreement during the post-petition, pre-rejection period. In *Sunflower Oil Co.* v. *Wilson*, 142 U.S. 313, 322 (1892), and *In re Rochester Shipbuilding Corp.*, 32 F.Supp. 98 (W.D.N.Y. 1940), the courts rejected contentions of non-debtor parties that a receiver could be forced to continue a contract on the basis that he had not taken immediate steps to disaffirm it. The courts in those cases did not suggest that a receiver could disregard obligations under the contract during the period prior to rejection. Indeed, the court in *Sunflower Oil* emphasized that the receiver, upon taking possession of the property, would pay "the stipulated rental for it so long as he used it." 142 U.S. at 322. In *In re McCormick Lumber & Mfg. Corp.*, 144 F.Supp. 804 (D.Ore. 1956), the court rejected the contention of a conditional sales vendor that it was entitled to reclaim certain machinery on the ground that the trustee's inaction within 60 days of adjudication of

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[9] Moreover, Bildisco clearly is not entitled to a "breathing spell" from enforcement of obligations determined in Board unfair labor practice proceedings. Section 362(b)(4) and (5) of the Bankruptcy Code, 11 U.S.C. 362(b)(4) and (5), expressly exempt from the scope of the automatic stay provision governmental actions to enforce "police or regulatory power." See *Ahrens Aircraft, Inc.* v. *NLRB*, 703 F.2d 23, 24 (1st Cir. 1983); *NLRB* v. *Evans Plumbing Co.*, 639 F.2d 291, 292-293 (5th Cir. 1981). Accordingly, Bildisco's Chapter 11 petition did not operate to stay the unfair labor practice proceedings as to either post-petition or pre-petition claims.

bankruptcy amounted to rejection. However, the court affirmed the referee's award to the vendor of the balance due on the conditional sales contract. In *Pacific Western Oil Co.* v. *McDuffie*, 69 F.2d 208, 213 (9th Cir.), cert. denied, 293 U.S. 568 (1934), the court rejected the contention that a claim for oil delivered under an executory contract *before* the inception of a receivership could be considered an expense of administration because the parties had continued to perform under the contract following inception of the receivership. In *Fletcher* v. *Surprise (In re Northern Indiana Oil Co.)*, 180 F.2d 669, 675-676 (7th Cir.), cert. denied, 340 U.S. 824 (1950), the court held that the trustee did not obtain title to a lease because he failed to assume the lease following his appointment. The issue before the court was whether the trustee was entitled to recover property associated with the lease, not whether he was required to adhere to the terms of the lease. In each of these cases, the comments of the court concerning a "breathing spell" for the receiver do not suggest that the court believed a receiver could ignore its obligations under a contract in the period prior to rejection. Rather, the courts were concerned with the effect of the receiver's failure expressly to assume or reject a contract in the period following the inception of the receivership.

Other cases Bildisco cites (Br. 38) are inapposite because they rest on special principles relevant to property leases. For example, *Philadelphia Co.* v. *Dipple*, 312 U.S. 168 (1941), concerned the tax liability of trustees who operated a business using property subject to leases and operating agreements. The court noted in dictum (*id.* at 174) that prior to affirmance or disaffirmance of such leases and agree-

ments the court could order payment of a reasonable sum for use and occupation. Bildisco relies on these cases for the proposition that "the right to receive compensation for benefits conferred [by a contract not adopted by the debtor-in-possession] is not based upon the debtor in possession's contractual liabilities but instead is an equitable right based upon the reasonable value of the benefits conferred" (Br. 38). In fact, the cited cases appear to be based on the principle that, because the debtor-in-possession does not take title to a lease until it has affirmatively assumed it, its obligation to pay is based on use rather than ownership. See 2 *Collier on Bankruptcy*, *supra*, ¶ 365.03, at 365-24 to 365-25. No such question of assumption of title arises in the case of an ordinary contract or a collective bargaining agreement.[10] The cases cited at pages 12-14, *supra*, and in our opening brief (at page 47) make clear that in such cases con-

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[10] Cf. *United States* v. *Security Industrial Bank*, No. 81-184 (Nov. 30, 1982), slip op. 5 (concluding that Bankruptcy Code does not authorize retroactive destruction of property rights, explaining that "our cases recognize, as did the common law, that the contractual right of a secured creditor to obtain repayment of his debt may be quite different in legal contemplation from the property right of the same creditor in the collateral").

In re Price Chopper Supermarkets, Inc., 19 Bankr. 462, 467 (Bankr. S.D. Cal. 1982), appears to apply the lease cases to rejection of a collective bargaining agreement, stating that an entity that provides services during the reorganization period is entitled to compensation based on the fair market value of the services provided to the estate. To the extent *Price Chopper Supermarkets* suggests that an employer is not bound to adhere to the terms of a collective bargaining agreement in the post-petition, pre-rejection period, we believe it was wrongly decided.

tractual obligations continue to exist in the post-petition, pre-rejection period.[11]

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[11] In any event, even if Bildisco were correct that it was not bound by the terms of the collective bargaining agreement during the post-petition, pre-rejection period, it does not follow that a unilateral change in working conditions could not be found to be an unfair labor practice. Bildisco does not challenge the proposition that, as debtor-in-possession, it was required to bargain with the Union about the bargaining unit employees' terms and conditions of employment. See Bildisco Br. 23, 32, 40. As Amicus Curiae American Federation of Labor—Congress of Industrial Organizations points out (Br. 14-24), federal statutes that regulate the conduct of business are not suspended merely because a business is being conducted by a debtor-in-possession or trustee under the supervision of a bankruptcy court. Nothing in the policy of the bankruptcy laws relieves Bildisco of its obligation under the National Labor Relations Act to bargain during the post-petition period. Accordingly, the Board could find Bildisco's unilateral action to be a violation of its duty to bargain with the Union even if the contract were in a state of suspension. As Amicus Curiae Chamber of Commerce appears to concede (Br. 3-4 n.4), claims based on unfair labor practices committed by the debtor-in-possession in the post-petition period are accorded a first priority as administrative claims. See also our opening brief at 49 n.38.

Bildisco's argument actually goes not to whether its unilateral changes during the post-petition, pre-rejection period could be found by the Board to be an unfair labor practice, but to the proper measure of damages. Thus, Bildisco apparently asserts that the employees who work for it during the post-petition period are entitled only to the reasonable value of their services unless the contract is assumed. But whether or not the contract is binding on Bildisco during that period, the Board could properly order Bildisco to pay the previously negotiated wage and benefit rates until it fulfilled its obligation to bargain about changes in working conditions. See *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 216 (1964), and the discussion in our opening brief at 23 n.11.

For the foregoing reasons, and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Nos. 82-818 & 82-852

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION, ET AL.,
Respondents.

LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD AND BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 99 national and international unions with a total membership of approximately 14,000,000 working men and women, hereby moves for leave to file the accompanying brief *amicus curiae* in support of the position of the petitioners in the instant cases. The workers represented

by AFL-CIO unions have a strong interest in the preservation of their wages and working conditions when their employer is in bankruptcy. The decision below severely undermines that interest.

In the attached brief, we make two basic points. First, that when the characteristics of a debtor-in-possession under the bankruptcy laws are properly understood, it becomes clear that debtor-in-possession is an alter ego of the bankrupt employer and as such subject to § 8(d)(1)-(4) of the National Labor Relations Act, as amended, which prohibits the termination or modification of the agreements except in compliance with the procedures established therein. Second, that because § 8(d) establishes public obligations (whereas § 301 of the Labor Management Relations Act protects the private interests of the parties in enforcing their agreement), it would be inconsistent with established bankruptcy principles to excuse the debtor-in-possession from obedience to § 8(d).

CONCLUSION

For the above stated reasons this motion for leave to file a brief *amicus curiae* should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

Nos. 82-818 & 82-852

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION, ET AL.,
Respondents.

LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD AND BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the AFL-CIO is set forth in that motion.

SUMMARY OF ARGUMENT

In the court of appeals' view, "[t]his case places the statutory policies underlying Chapter 11 [the Bankruptcy Code] in tension with our national labor policy as expressed in the National Labor Relations Act." 682 F.2d 72, at 77-78. We disagree. The "tension" perceived by the court below is of its own creation. For nothing in the Bankruptcy Code correctly understood relieves a debtor-in-possession of the obligations stated in § 8(d) of the NLRA or of the obligations stated in other similar public laws.

In part I of our argument we show the error in the "new entity" theory which originated in *Shopmen's Local Union No. 455 v. Kevin Steel Products, Inc.*, 519 F.2d 698, 704 (C.A. 2) (*"Kevin Steel"*) and was adopted by the court of appeals—*viz*, the theory that the debtor-in-possession is, for purposes of the labor law, a "successor" of the bankrupt employer and therefore free under § 8(d) to disavow the bankrupt's collective agreement. 682 F.2d at 83 citing *NLRB v. Burns Security Services, Inc.*, 406 U.S. 272, 284. An alter ego is bound by § 8(d)'s requirements in the same manner as the signatory employer. See *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 259, n.5. And a comparison of the characteristics of the employer prior to filing for bankruptcy with those of the debtor-in-possession thereafter, makes clear that under the NLRB's well-established standards, the latter is the alter ego of the former not a successor. Accordingly, the court below erred in reversing the Board's holding that the debtor-in-possession in this case is an alter ego subject to § 8(d)'s requirements in full.

In Part II of our argument we show that it would be inconsistent with established bankruptcy law principles to permit a debtor-in-possession to terminate or modify an agreement without compliance with the procedures in § 8(d)(1)-(4) of the NLRA, as amended. The key to

analysis is the proposition that § 8(d) was not enacted to further the interest of the parties to an agreement in its enforcement, as does the common law of contracts. Rather, § 8(d) is directed to accomplish a *public* objective—

> The purpose of the proscription of unilateral mid-term modifications and terminations in § 8(d) [is] not * * * simply to assure adherence to contract terms. * * *
>
> The structure and language of § 8(d) point to a more specialized purpose than merely promoting general contract compliance. The conditions for a modification or termination set out in paragraphs (1) through (4) plainly are designed to regulate modifications and terminations so as to facilitate agreement in place of economic warfare. [*Chemical Workers v. Pittsburgh Glass*, 404 U.S. 157, 187.]

And this public purpose is accomplished through the unfair labor practice procedures of a *public* agency, the NLRB. Vindication of the private interest in the enforcement of collective agreements in their entirety is "left to the usual processes of the law and not to the National Labor Relations Board." *Id.*, quoting H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., at 42. Section 365 of the Bankruptcy Code alters the common law rights and obligations of parties to contracts, analogous to the rights and obligations recognized in § 301. But neither § 365 nor any other provision of the Code excuses the debtor-in-possession or trustee in bankruptcy from the public obligation described in § 8(d). For it is a well-established principle of bankruptcy law 'that federal statutes regulating business in the public interest are equally applicable when the business is run by trustees or receivers." *Cullen v. Bowles*, 148 F.2d 621, 623 (C.A. 2).

ARGUMENT

The court of appeals held that § 1107 of the Bankruptcy Code, 11 U.S.C. § 1107, which provides that a debtor-in-possession has the rights and responsibilities of a trustee in bankruptcy, and § 365 of that Code, 11 U.S.C. § 365, which governs the assumption and rejection of executory contracts, lead to the conclusion that a debtor-in-possession that desires to change the wages and working conditions stated in a collective agreement between the bankrupt company and an exclusive bargaining representative of the company's employees may do so without observing the requirements of § 8(d)(1)-(4) of the National Labor Relations Act as amended by the Labor Management Relations Act, 29 U.S.C. §§ 141 *et seq.* It is our position that § 1107 does not make the debtor in possession a "new entity" legally distinct from the bankrupt company for the purposes of the labor laws, that under basic labor law principles the debtor in possession is therefore obliged to conform to § 8(d)'s requirements, and that § 365 does not empower the bankruptcy courts to override the public rights and obligations stated in § 8(d), a provision enacted by Congress to further the public purpose of minimizing industrial strife.

I. A DEBTOR-IN-POSSESSION IS, FOR THE PURPOSES OF § 8(d) OF THE NLRA, AS AMENDED, AN ALTER EGO OF THE BANKRUPT EMPLOYER.

The court of appeals determined that a debtor-in-possession is not governed by § 8(d) of the NLRA, as amended, insofar as that provision forbids an employer to terminate or modify a collective agreement during its term without satisfying the conditions set forth in § 8(d)(1)-(4).

The court below reached that result on the theory that the debtor-in-possession is a "new entity . . . created with its own rights and duties, subject to the supervision of the bankruptcy court." 682 F.2d 72,

quoting from *Shopmen's Local Union No. 455 v. Kevin Steel Products, Inc.*, 519 F.2d 698, 704 (C.A. 2) (hereafter "*Kevin Steel*"). On that premise, the court of appeals declared that the "debtor-in-possession's position is analogous to that of a successor employer: It may be required to recognize and bargain with the union, but it is not a party to its predecessor's collective bargaining agreement unless it assumes that agreement. *NLRB v. Burns Security Services, Inc.*, 406 U.S. 272, 284." 682 F.2d at 83. That court therefore rejected the NLRB's determination that the debtor-in-possession is an "alter ego" of the bankrupt employer who is a party to the collective agreement. As an alter ego, the debtor-in-possession would be subject to § 8(d)'s requirements in full on the authority of *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249 (hereafter "*Howard Johnson*"), which carefully distinguished between the obligations of a successor and those of an alter ego:

> It is important to emphasize that this is not a case where the successor corporation is the "alter ego" of the predecessor, where it is "merely a disguised continuance of the old employer." *Southport Petroleum Co.* v. *NLRB*, 315 U.S. 100, 106 (1942). Such cases involve a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management. In these circumstances, the courts have had little difficulty holding that the successor is in reality the same employer and is subject to all the legal and contractual obligations of the predecessor. See *Southport Petroleum Co.* v. *NLRB*, *supra*; *NLRB* v. *Herman Bros. Pet Supply*, 325 F.2d 68 (CA6 1963); *NLRB* v. *Ozark Hardwood Co.*, 282 F.2d 1 (CA8 1960); *NLRB* v. *Lewis*, 246 F.2d 886 (CA9 1957). [417 U.S. at 259, n.5.] [1]

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[1] *Howard Johnson*, of course, arose under § 301 of the LMRA. But the principal holding of that case is that the limitations on a successor's obligations to honor a predecessor's contract under

We submit that it was the court of appeals, rather than the Board, which erred in characterizing the status of the debtor-in-possession, and therefore in determining the latter's § 8(d) obligations. The "new entity" theory on which the opinion below and the *Kevin Steel* opinion proceed was carefully analyzed, and shown to be fallacious in *In Re Brada Miller Freight System*, —— F.2d ——, 112 LRRM 3410 (C.A. 11, April 11, 1983) (hereafter "*Brada Miller*"). Judge Tuttle wrote there:

> While we recognize that the debtor-in-possession may constitute a "new juridical entity" for some purposes, we find the debtor-in-possession indistinguishable from the pre-bankruptcy corporation as far as concerns their respective obligations under the collective bargaining agreement and the labor laws that regulate the formation, existence, and termination of such agreements.
>
> The most obvious problem with the new entity theory is the statutory requirement that a debtor-in-possession purportedly not a party to contracts executed by the pre-bankruptcy corporation, apply to the bankruptcy court for approval of its rejection of a collective bargaining agreement. If Congress had intended that the debtor-in-possession be in no way bound by the contracts of the pre-bankruptcy entity, the statutory scheme could simply prescribe that the filing of the bankruptcy petition constitutes a breach of all executory contracts to which the debtor is a party and grant the trustee/debtor-in-possession discretionary power merely to assume, not reject, these contracts.
>
> Conversely, if a bankruptcy court refuses to allow a debtor-in-possession to reject a collective bargaining agreement, the debtor-in-possession is bound retroactively to the agreement from the time of the

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§ 8(d) as declared in *Burns* are applicable in suits to enforce a contract brought under § 301. Because the Court derived its § 301 ruling from § 8(d) precedent, that limitation is one common to both of these provisions.

filing of the petition; yet, the proponents of the new entity concept have failed to articulate a legal theory which justifies binding a "non-party" to the agreement. In these circumstances, the new entity theory collides head on with the fact that a debtor-in-possession may be held accountable for breaches of the collective bargaining agreement committed in the time between the filing of the petition and the motion for rejection.

In short, the viability of the new entity theory is contingent on the bankruptcy court's granting of the debtor-in-possession's motion to reject the collective bargaining agreement. Its fragility is all too apparent in contrary situations where the debtor-in-possession is compelled to comply with the terms of an existing collective bargaining agreement. [112 LRRM at 3414-3415, footnotes omitted.] [2]

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[2] The *Brada Miller* Court noted too:

> Perhaps recognizing some of the inherent faults of the new entity theory, the Second Circuit, its principal proponent, has attempted to restrict the theory's application since its promulgation in Kevin Steel and REA Express. In Matter of Unishops, Inc., 543 F.2d 1017, 1018-9 (2d Cir. 1976), the court wrote:
>
> We again caution that the language of [Kevin Steel] stating that "[a] debtor-in-possession under Chapter XI . . . is not the same entity as the pre-bankruptcy company" should not be extended as a generalization in cases other than those involving labor collective bargaining agreements where the claim is that Section 8(d) of the [NLRA] . . . precludes disaffirmance of the labor agreement in a Chapter XI proceeding without taking the steps required under Section 8(a) of the Labor Act; or under the Railway Labor Act . . ."
>
> However, this constraining language does nothing to cure the problems with the theory; once it is determined that § 365 is applicable to collective bargaining agreements, we see no evidence of a distinction by Congress between collective bargaining agreements and ordinary executory contracts that would support the Second Circuit's efforts to limit the theory's applications. The more the theory is forcibly restricted to a particular legal situation, the more appropriate becomes its character as a "legal fiction."

Whereas the court of appeals charged the NLRB with having a "fundamental misconception of the law" (682 F.2d at 83), the *Brada Miller* analysis demonstrates that the "new entity" theory embraced by the court below is unsound even if viewed entirely from the perspective of bankruptcy law, and is a legal "fiction" (*Brada Miller*, 112 LRRM at 3415) adopted to achieve labor relations objectives benefitting the debtor-in-possession. And when the characteristics of a debtor-in-possession are viewed directly rather than through the distorting mirror of the *Kevin Steel* "new entity" theory, it is readily seen that the debtor-in-possession is, for purposes of § 8(d), an "alter ego" of the bankrupt employer rather than its successor.

The hypothesis that the debtor-in-possession is, by virtue of the Bankruptcy Code, a *different* entity merely poses, but does not answer, the question whether one of the separate entities is the alter ego of the other.[3] To answer that question,

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[3] It is not clear that Congress intended the debtor in possession to be considered an entity different from the "debtor" (bankrupt employer). First, 11 U.S.C. § 1101 defines the debtor-in-possession to mean the "*debtor* except when a person that has qualified under section 322 of this title is serving as trustee in the case." Second, the issue of the debtor-in-possession's status goes principally to how the business is to be managed, not to the ownership of the business or its obligations under law. The House Report on the 1978 Bankruptcy Code states:

> An initial question in a reorganization case is whether the management of the debtor should be left in possession to operate the business, or whether an independent trustee, representing the creditors' and equity security holders' interests, should be appointed to replace the management. If a trustee is appointed, the management is completely ousted, although occasionally a trustee hires former management to handle day-to-day operations. The trustee is put completely in control of the business. If a *trustee is not appointed, then business continues as usual, subject, however, to court supervision over the debtor's actions.* [H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 220].

[Continued]

> the Board looks to the ownership management, business purpose, operation, equipment, customers, and supervision of the two businesses. Where some of these listed indicia are "substantially identical," the Board will find an alter ego status. However, not all of these standards have to be satisfied; centralized control of labor relations or identical corporate ownership is not crucial to the finding of an alter ego. [*Blake Construction Co., Inc.*, 245 NLRB 630, 634 (1979)].

The characteristics of an employing entity before and after filing for bankruptcy and attaining the status of a debtor-in-possession are such that the foregoing criteria for identifying an alter ego are clearly satisfied. Indeed, none of these criteria are changed by virtue of going into bankruptcy; by allowing the employer to continue to operate his business as a debtor-in-possession, rather than under the control of a trustee, the 1978 Bankruptcy Code reinforces the substantial continuity of the enterprise. See n. 3 *supra*. It is significant in this regard that neither the court below nor the *Kevin Steel* court has pointed to any characteristics of the debtor-in-possession that would negate alter ego treatment.

Because of the respondent's failure to file an answer, the Board was not called upon in this case to make a finding that the respondent is the alter ego of his pre-bankruptcy signatory to the agreement. But, the NLRB law in this regard is uniform and longstanding. The Board had previously held a debtor-in-possession in a

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[3] [Continued]

Indeed, the Bankruptcy Code Reports referred to the debtor and the debtor in possession interchangeably:

> During the progress of the case, the business of the debtor continues to operate. The trustee, *or if the debtor remains in possession, the debtor*, does what is necessary to reduce the business' losses, by selling unprofitable divisions, by closing certain plants or stores, by reducing the workforces, or by *rejecting or renegotiating burdensome contracts*. [*Id.* at 221 (emphasis added)].

Chapter 11 proceeding under the 1978 Bankruptcy Code to be an alter ego of the bankrupt employer. *Jersey Juniors, Inc.*, 230 NLRB 329, 331-332 (1977).[4] And the Board has also held both before and after adoption of the 1978 Code that a *trustee* in bankruptcy is an alter ego of the bankrupt employer, barring a major change in the business operations. Compare *Airport Limousine Service, Inc.*, 231 NLRB 932, 934, n.2 (1977); *Cagle's Inc.*, 218 NLRB 603, 604 (1975); and *Marion Simcox, Trustee of Wagner Shipyard and Marine, Inc.* and *Stateside Service, Inc.*, 178 NLRB 516, 518 (1969) (all holding court-appointed trustees or receivers alter-egos of the original employers) with *Blazer Industries, Inc.*, 236 NLRB 103, 109 (1978) (holding that a receiver was not an alter-ego based on substantial reductions in operations and work force of the original employer initiated by the receiver.) (The status of a trustee for § 8(d) purposes, we note, is not before the court.)

II. BANKRUPTCY COURTS DO NOT HAVE THE AUTHORITY TO RELIEVE DEBTORS-IN-POSSESSION OF THEIR PUBLIC LAW OBLIGATIONS GENERALLY OR OF THEIR § 8(d) OF THE NLRA, AS AMENDED, OBLIGATIONS IN PARTICULAR.

(a) The court of appeals' second major premise was that a collective agreement is a contract in the normal and accepted sense of that term and hence that collective agreements are squarely within the area covered by § 365 of the Bankruptcy Code, the provision governing "executory contracts." But as this Court reminded once again earlier this year:

> a collective-bargaining agreement "is *more than a contract*; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." *United Steelworkers of America v. Warrior*

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[4] The Board in *Jersey Juniors* did acknowledge that the Second Circuit in *Kevin Steel* had allowed a bankruptcy court to reject a collective bargaining agreement that would otherwise be binding on the debtor-in-possession. 230 NLRB at 232. However, the ques-

> *& Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). In defining the relationships created by such an agreement, the Court has applied an evolving federal common law grounded in national labor policy. [*Bowen v. United States Postal Service*, —— U.S. ——, 51 L.W. 4051, 4057-4058 (Jan. 11, 1983); emphasis added.]

The essence of that "national labor policy" and the place of the collective agreement in that policy was explained in *Teamsters Union v. Oliver*, 358 U.S. 283, 295:

> The goal of federal labor policy, as expressed in the Wagner and Taft-Hartley Acts, is the promotion of collective bargaining; to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife. See *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45; *Labor Board* v. *American National Ins. Co.*, 343 U.S. 395, 401-402. Within the area in which collective bargaining was required, Congress was not concerned with the substantive terms upon which the parties agreed. Cf. *Terminal Railroad Assn.* v. *Brotherhood of Railroad Trainmen*, 318 U.S. 1, 6. The purposes of the Acts are served by bringing the parties together and establishing conditions under which they are to work out their agreement themselves.

Precisely because the "conditions under which [employers and unions] work out their agreements themselves," are the very core of the national labor policy, Congress defined those conditions in § 8(d) of the NLRA, as amended:

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tion whether, following a rejection order, a debtor-in-possession may change wages and working conditions without regard to § 8(d) was not before the Board in *Jersey Juniors*. None of the Board's decisions or dicta suggest that the Bankruptcy Code excuses a debtor from § 8(d)(1)-(4) either before or after a bankruptcy court rejection order. As discussed in this brief, the Code does not provide for any such excuse.

> The section stems from the 1947 revision of the Act, an important theme of which was to stabilize collective-bargaining agreements. The Senate bill, in particular, contained provisions in §§ 8(d) and 301(a) to prohibit unilateral mid-term modifications and terminations and to confer federal jurisdiction over suits for contract violations. See S. 1126, 80th Cong., 1st Sess., §§ 8(d), 301(a). The bill also included provisions to make it an unfair labor practice for an employer or labor organization "to violate the terms of a collective-bargaining agreement." *Id.*, §§ 8(a)(6), 8(b)(5). In conference the Senate's proposed §§ 8(d) and 301(a) were adopted with reatively few changes. See H.R. Conf. Rep. No. 510, *supra*, at 34-35, 65-66. The provisions to make contract violations an unfair labor practice, on the other hand, were rejected with the explanation that "[o]nce parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." *Id.*, at 42. [*Chemical Workers v. Pittsburgh Glass*, 404 U.S. 157, 186 (hereafter "*Pittsburgh Glass*").]

And, the lesson the *Pittsburgh Glass* Court drew from the 1947 amendments is very much in point here:

> *The purpose of the proscription of unilateral mid-term modifications and terminations in § 8(d) cannot be, therefore, simply to assure adherence to contract terms.* As far as unfair-labor-practice remedies are concerned, that goal was to be achieved through other unfair-labor-practice provisions that were rejected in favor of customary judicial procedures. See *Dowd Box Co.* v. *Courtney*, 368 U.S. 502, 510-513 (1962).
>
> The structure and language of § 8(d) point to a more specialized purpose than merely promoting general contract compliance. *The conditions for a modification or termination set out in paragraphs (1) through (4) plainly are designed to regulate modifications and terminations so as to facilitate agree-*

> *ment in place of economic warfare.* Thus, the party desiring to make a modification or termination is required to serve a written notice on the other party, offer to meet and confer, notify mediation and conciliation agencies if necessary, and meanwhile maintain contract relations. Accordingly, we think we accurately described the relevant aim of § 8(d) when we said in *Mastro Plastics Corp.* v. *NLRB*, *supra*, at 284, that the provision "seeks to bring about the termination and modification of collective-bargaining agreements without interrupting the flow of commerce or the production of goods . . . ." [404 U.S. at 187.]

Accordingly, *Pittsburgh Glass* "hold[s] that a modification of a collective agreement during its term "is a prohibited unfair labor practice only when it changes a term that is a mandatory subject of bargaining." 404 U.S. at 185. And to underline the differences between the rights and obligations created by § 8(d) and the contract rights and obligations recognized in § 301, *Pittsburgh Glass* emphasizes that the "remedy for a unilateral mid-term modification to a permissive term lies in an action for breach of contract * * * not in an unfair labor practice proceeding." 404 U.S. at 188.

The NLRA and LMRA, then, establish a dual regime with regard to the negotiation and renegotiation of collective agreements: Section 301 states a set of rules that, like the common law of contracts, is designed "to assure adherence to contract terms." Those rules, again like the law of contracts generally, are enforceable through the "usual processes of the law." Section 8(d), in turn, states a *second* set of rules that have a "more specialized purpose than merely promoting general contract compliance"—*viz.*, "*facilitating agreement in place of economic warfare.*" This second set of rules, like the rest of the regulatory scheme governing the collective bargaining process, is not subject to the "usual processes of the law" but to the system of administration specially designed by Congress for this purpose. That system of

administration and the rights and obligations that are its province are entirely distinct from the private law of contracts:

> The proceeding authorized to be taken by the Board under the National Labor Relations Act is not for the adjudication of private rights. * * * The Board acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce. * * * The immediate object of the proceeding is to prevent unfair labor practices which, as defined by §§ 7, 8 are practices tending to thwart the declared policy of the Act. [*Nat. Licorice Co. v. Labor Board*, 309 U.S. 350, 362-363.]

Thus, even where an unfair labor practice proceeding concerns a collective agreement,

> the right asserted by the Board is *not* one arising upon or derived from the contracts between [the employer] and its employees. The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices. [*Id.* at 364; emphasis added.]

In sum, the rights and obligations stated in § 8(d) are public rights and obligations that are separate and apart from contract rights and obligations. While § 8(d), *inter alia*, concerns the procedures for modifying those portions of a collective agreement dealing with "wages, hours, terms and conditions of employment," its essence is not to assure adherence to a contract but to state public law rules concerning the times at which there will be economic peace and the times at which the parties may initiate economic warfare and the forms that must be followed in so doing. The requirement that the *status quo* with regard to mandatory bargaining subjects be maintained during certain periods is a means to achieve the overall end of the NLRA—minimizing economic strife.

The status of the obligations stated in § 8(d) during a bankruptcy proceeding is therefore no different than

the status of the obligation to maintain specified labor standards stated in the Fair Labor Standards Act. While Congress in the NLRA has left it to the parties to work out the substance of the applicable wages and working conditions rather than spelling those out in the Act, Congress has, by statute, determined that the wages and other working conditions once set may only be modified in the manner provided for in the NLRA. Once this is recognized, it follows that the authority of the bankruptcy court to relieve a debtor-in-possession of the obligations stated in § 8(d) is no different from the authority of the bankruptcy court to relieve debtors in possession of public law obligations generally—such as those specifying the level of pollutants that may be discharged into the air or the precautions that must be taken in production in the interest of the health and safety of consumers or employees or any other regulation in the public interest imposed on businesses generally. It is to the nature and limits of the bankruptcy courts' authority in that regard that we now turn.

(b) "It has been generally held that federal statutes regulating business in the public interest are equally applicable when the business is run by trustees or receivers." *Cullen* v. *Bowles*, 148 F.2d 621, 623 (C.A. 2).[5]

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[5] In *Cullen* v. *Bowles*, a Chapter X trustee, operating an apartment house, claimed that he was not bound by regulations prescribing maximum rentals under the Emergency Price Control Act. The court rejected this claim. See also *United States* v. *Nixon*, 235 U.S. 237, holding that a railroad receiver was obligated to obey rules and regulations promulgated by the Secretary of Agriculture pursuant to a statute governing shipment by common carriers of cattle from a quarantine district. The pre-Code decisions consistently confirmed that the post-petition operations of a debtor-in-possession or trustee are subject to federal regulatory statutes. *See, e.g., Northern Boneless Meat Corp.*, 9 B.R. 27 (S.D. N.Y.) (Packers and Stockyards Act); *In the Matter of Canarico Quarries*, 466 F. Supp. 1333 (D.P.R.) (state regulations promulgated pursuant to Federal Clean Air Act); *Plourde* v. *Mass. Cities Realty Co.*, 47 F. Supp. 668 (D. Mass.); *Brennan* v. *T&T Trucking Co., Inc.*, 396 F. Supp. 615 (N.D. Okla.) (Fair Labor Standards Act).

The point is so self evident as to scarcely have been controverted. For, as stated in *Donovan* v. *TMC Industries*, 20 B.R. 997 (N.D. Ga.), the Bankruptcy Code does not in terms dictate the opposite view and absent such a Congressional directive any other rule is "unimaginable". There the Secretary of Labor sought injunctive relief against a Chapter 11 debtor-in-possession to enjoin shipment of goods manufactured by the debtor without paying the compensation to its employees required by the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* That court rejected the debtor's contention that the Secretary's action should be stayed:

> The employer has violated a federal statute, it has not merely breached a private agreement and it is the enforcement of the statute, not compliance with a private contract that concerns the Secretary * * *. Whether the law is designed to prohibit fraud, prevent pollution, remove safety hazards, or insure domestic tranquility, the government is not stymied by the debtor's petition in the bankruptcy court * * *. The concern with the health and welfare for the American worker, and the need to reduce labor strife is at the core of the FLSA. To allow a petition in bankruptcy to preempt the remedy available to the Secretary to protect the health and welfare of American workers is unimaginable. [20 B.R. at 1004-1006.]

It has therefore been recognized from the first that a debtor-in-possession, like any other employer, must comply with the NLRA's provisions:

> [I]t will hardly be denied that a debtor in possession is responsible for the unfair labor practices which occur during a reorganization. It's status as an employer is no different, so far as the National Labor Relations Act, 29 U.S.C.A. § 151 *et seq.* is concerned than that of any other employer. Court supervision of corporate reorganization affords the operating possessor no freedom from the statutory duty to its

employees * * *". [*NLRB* v. *Baldwin Locomotive Works*, 128 F.2d 39, 43 (C.A. 3).] [6]

The case law just noted is solidly grounded in the applicable statutory provisions. First, since 1887 the United States Code has provided, to use the current language:

> Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury. [28 U.S.C. § 959(a).] [7]

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[6] See also *Nathanson* v. *NLRB*, 344 U.S. 25; *In re Shippers Interstate Service, Inc.*, 618 F.2d 9, 13 (C.A. 7); *In re Bel Air Chateau Hospital*, 611 F.2d 1248 (C.A. 9); *NLRB* v. *Coal Creek Coal Co.*, 204 F.2d 579 (C.A. 10); *NLRB* v. *Bachelder*, 120 F.2d 574 (C.A. 7).

[7] Moreover, to alleviate any concern that by reason of the Supremacy Clause federal bankruptcy law would preempt the authority of the states to carry out their regulatory programs 28 U.S.C. § 959(b) and its predecessors preserve state authority:

> The goal of Chapter XI of the Bankruptcy Act is to rehabilitate the debtor. The stay of Rule 11-44(a), aids that rehabilitation and paralyzes suits by creditors or interferences with debtor's property. However, it is our understanding that such rehabilitation must be done within the law. Under no circumstances can there by any rehabilitation outside the law. Debtor must operate its business in full compliance with the laws and regulations of the State. To these effects, Section 959 of Title 28, United States Code, states:
>
> "b. A trustee, receiver or manager appointed in any cause pending in any court of the United States, *including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the state in which such property is situated, in the same manner that the owner or*

As this Court stated "the right given by the statute to sue for the acts and transactions of the receivership is unlimited." *McNulta* v. *Lockridge*, 141 U.S. 327, 332.

The court of appeals pointed to § 365 of the Code as the basis upon which the bankruptcy court may override the public law rules stated in § 8(d). But § 365 deals exclusively with contractual rights and remedies. While § 365 speaks literally of a right of assumption or rejection, it is always true that any party to a contract has the *power* to breach a contract at the pain of being subjected, depending on private law principles, to a judicial order to pay damages or to perform. The essential thrust of § 365 is twofold: first, to modify or replace ordinary private law rules concerning what constitutes a breach and the availability of specific performance; and second, to set out the status in the bankruptcy proceeding of claims arising from a breach.[8]

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possessor thereof would be bound to do if in possession thereof." (Emphasis added).

To authorize debtor to operate its business without obtaining a permit from appellant, under the protection of Rule 11-44(a), violates Section 959, supra. To allow such violation of state law, is not within the jurisdiction of the Bankruptcy Court. *Brennan* v. *T. & T. Trucking, Inc.*, D.C., 396 F.Supp. 615 (1975). Chapter XI Rules were meant to be procedural in nature and were not intended to enlarge or modify substantive rights. Title 28, United States Code, Section 2075; *Mid Jersey National Bank* v. *Fidelity Mortgage Investors*, 3 Cir., 518 F.2d 640. [*In the Matter of Canarico Quarries, Inc. supra*, 466 F. Supp. at 1339.]

[8] Subsection (a) provides the bankruptcy court only with authority to approve the assumption or rejection of private contracts. The remaining subsections deal with relative rights of the parties in cases of assumption or rejection and do so in terms that confirm that the sole subject is contract rights. Subsections (b), (c), (e) and (f) deal with the consequences of default and the rights of the non-debtor party to decline to fulfill the contract or to refuse its assumption or assignment by the trustee. Subsection (d) establishes time frames for the decision to reject. Subsections (g) through (k) provide specific rules governing the liabilities and other consequences resulting from a decision to reject or to assign an executory contract or unexpired lease.

The impact of an order of rejection under § 365 of the Code is *at most* on the remedies available to the non-debtor party under private law. But the court below has taken § 365 one step further by holding that an order of rejection permits the debtor-in-possession thereafter to change wages, hours and working conditions without regard to § 8(d) and that the NLRB is powerless to proceed against the debtor-in-possession with respect to such a statutory violation. This approach is wholly inconsistent with the decisional law and is without any foundation in § 365. Thus, § 365 provides no authorization whatsoever to the bankruptcy court to pretermit the federal government's authority to enforce its public laws and no leave to the trustee or debtor-in-possession to disregard public law obligations.

There are only two other grants of authority to the bankruptcy court that are evenly arguably pertinent.

The first is § 362 of the Bankruptcy Code, 11 U.S.C. § 362, which provides that on the commencement of a bankruptcy case certain proceedings against the debtor are automatically stayed. Although Congress considered the automatic stay to be "one of the fundamental debtor protections provided by the bankruptcy laws * * * giv[ing] the debtor a breathing spell * * * [and] permit[ing] the debtor to attempt a repayment or reorganization plan" (S. Rep. 95-989, 95th Cong. 2nd Sess. 55; H.R. Rep. 95-595, 95th Cong. 1st Sess. 340), §§ 362 (b)(4) & (5) expressly except from the provision's ambit state and federal government actions to "enforce such governmental unit's police or regulatory power".[9]

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[9] *NLRB* v. *Evans Plumbing Co.*, 639 F.2d 291 (C.A. 5) (granting petition for enforcement of NLRB decision ordering the reinstatement of two employees with backpay); *Commodity Futures Trading Commission* v. *Incomes, Inc.*, 649 F.2d 128 (C.A. 2) (requiring CFTC access to debtors' books and records on trading activity); *Securities and Exchange Commission* v. *First Financial Group of Texas*, 645 F.2d 429 (C.A. 5) (S.E.C. appointment of receiver and injunction against offer of securities.) *In re Mansfield Tire and*

The purpose of these exemptions is to preserve governmental authority to "prevent or stop violation of fraud, environmental protection, consumer protection, safety or similar police or regulatory laws, or attempting to fix damages for violation of such a law * * *". S. Rep. 95-989, at 56; H.R. Rep. at 341.[10]

Second, in 1978 Congress also provided the bankruptcy courts the authority to stay certain actions not covered by § 362. Section 105 of the Bankruptcy Code, 11 U.S.C. § 105, grants the power to issue orders necessary or appropriate to carry out the provisions of title 11. In addition, the bankruptcy courts are brought within the scope of the All Writ statute, 28 U.S.C. § 1651 and are given the powers of a court of law, equity and admirality, 28 U.S.C. § 1481.

Both the Senate and House Reports explain the point of these provisions as follows:

> Section 105, of proposed title 11, derived from Bankruptcy Act § 2a(15), grants the power to issue orders necessary or appropriate to carry out the provisions of title 11. The district court and the bankruptcy court as its adjunct have all the traditional injunctive powers of a court of equity, 28 U.S.C. §§ 151 and 164 as proposed in S. 2266, § 201, and 28 U.S.C. § 1334, as proposed in S. 2266, § 216. Stays or injunctions issued under these other sec-

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Rubber Co., 660 F.2d 1108 (C.A. 6) (permitting Ohio Workmen's compensation proceedings to continue); *Donovan* v. *TMC Industries Ltd.* (N.D. Ga. 1982) (Secretary of Labor permitted to enjoin shipment of goods produced in violation of the Fair Labor Standards Act); *U.S.* v. *Energy International Inc.* D.C. 19 B.R. 1020 (S.D. Ohio 1981) (civil penalty assessed by Department of Interior for violations of Surface Mining and Control Act of 1977.)

[10] Notwithstanding the broad grant of jurisdiction to the bankruptcy courts, Congress acted affirmatively to protect the governmental interest in uniform enforcement of public laws by expressly excluding from § 1478 of the Judicial Code, 28 U.S.C. § 1478, the authority to remove to the bankruptcy courts a civil action by a governmental unit to enforce its police and regulatory power.

> tions will not be automatic upon the commencement of the case, but will be granted or issued under the usual rules for the issuance of injunctions. [S. Rep. 95-989, *supra*, at 51; H.R. Rep. 95-595, *supra*, at 342.]

As we have seen, the pre-Code cases consistently held that the bankruptcy courts have no authority to sanction conduct violating public law under the guise of protecting their jurisdiction. And the proposition that a court of equity is empowered to nullify federal statutes in aid of its jurisdiction is manifestly without merit.

(c) Our showing to this point is that nothing in the Bankruptcy Code grants the bankruptcy courts the authority to override public law rights and obligations generally or § 8(d) rights and obligations in particular. Moreover, so far as we have discovered, nothing in the 1978 Code Reports or floor debates shows a contrary congressional intent; indeed, the question presented here is not even noted. The court below, however, suggested that this lack of any affirmative support for its view is overcome by 11 U.S.C. § 1167, which "permits an inference that, with this one exception, Congress did not intend to distinguish collective bargaining agreements from executory contracts in general". 682 F.2d at 78. That provision states

> Notwithstanding section 365 of this title, neither the court nor the trustee may change the wages or working conditions of employees of the debtor established by a collective bargaining agreement that is subject to the Railway Labor Act (45 U.S.C. 151 *et seq.*) except in accordance with Section 6 of such Act (45 U.S.C. 156).

As passed in 1935, and continued until passage of the 1978 Code, the predecessor provision to the foregoing, had provided in part:

> No judge or trustee acting under this Act shall change the wages or working conditions of railroad employees except in the manner prescribed in the

> Railway Labor Act, as amended June 21, 1934, or as it may be hereafter amended. [§ 77(n) of the Bankruptcy Act 49 Stat. 911 (1935).]

The substance of § 1167, of course, supports our argument that the maintenance of the public law rules designed to further industrial peace are entirely compatible with the aims and purposes of the Bankruptcy Code. It is, intuitively obvious that economic warfare is not conducive to a successful reorganization. Rather, the court of appeals' premise is that but for § 1167 the result opposite to that mandated there would obtain. Nothing in the Bankruptcy Code provides a basis for that premise, as we have shown. Thus, the sounder inference is that § 1167 is designed to remove all controversy on a point of particular importance given the prevalence of railroad reorganizations. The evolution of the provision demonstrates as much.

The failure to include § 77(n) or its equivalent, that is § 1167, in the Bankruptcy Code would properly have been interpreted as a tacit reversal of its prohibition and an authorization to railroad trustees to change wages and working conditions without exhausting the processes of § 6 of the RLA. But the inclusion of § 1167 says nothing with respect to the obligations of a trustee (or debtor-in-possession) under § 8(d) of the NLRA.[11] Be-

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[11] Neither the committee reports nor the floor debates on the Bankruptcy Reform Act of 1978 refer to § 8(d) or the status of labor agreements generally under the NLRA.

No inference is permissible from Congressional reference in 1976 in the Report of the House Judiciary Committee on the Municipal Bankruptcy Act ("MBA"), P.L. 94-260, H.R. Rep. No. 94-686, 94th Cong., 1st Sess., 8-9, to rejection of agreements governing municipal employees under state law, that Congress intended to repeal § 8(d) of the NLRA as to trustees and debtors in possession *sub silentio* in the 1978 Act. The MBA House Report is clear that state law requirements on termination of public employee agreements, which may or may not be comparable to § 8(d), were not to be superseded by § 82 of the MBA permitting rejection of executory contracts. *Id.* The enactment governing bankruptcy of

cause there was no provision regarding § 8(d) in the pre-Code law analogous to § 77(n), the *status quo ante* could preserved without referring in the Code to the trustee's obligations under the NLRA. And, when § 8(d) was adopted in 1947 it had been recognized that a trustee in bankruptcy is subject to the provisions of the NLRA. While the definition of "person" in § 2(1) was amended at that time in another respect (by adding "labor organizations" to the definition), the inclusion of "trustees, trustees in bankruptcy [and] receivers" was retained. There was no indication that Congress intended to except the obligations stated in § 8(d) from the obligations of bankruptcy trustees under the then-existing relationship between the labor and bankruptcy laws.

Yet, if the inference which the court of appeals drew from § 1167 were valid, it would likewise follow that § 8(d) was inapplicable to such trustees at the time of its original enactment in 1947. For, then, just as now, the bankruptcy law contained an express requirement that railroad trustees adhere to the obligations of the RLA before changing wages and working conditions (§ 77(n)) but had no such provision with respect to trustees who were subject to the NLRA.

In short, the difference in sequence of the relevant enactment fatally undermines the court of appeals' inference: when § 77(n) was enacted, § 6 of the RLA was already on the books.[12] It might have been argued, absent § 77(n), that the elaborate railroad reorganization provisions adopted in 1935 rendered § 6 of the RLA in-

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public employers, who are not subject to the NLRA and LMRA, cannot possibly be read to affect the rights and duties of private employers who are subject to those Acts.

[12] Section 77(n) had its antecedent in § 77(o) of the 1933 amendments to the Bankruptcy Act governing railroad reorganization. As is clear from the face of the provision, in 1933 public law already regulated the termination and modification of labor agreements in the railroad industry.

applicable to the reorganization trustees. While such an argument might have been unsuccessful, the body of precedent requiring reorganization trustees to adhere to public laws was not as well developed as in 1947, or at present. In any event, the 1935 Congress, conscious of § 6, which had been adopted in the 1934 revision of the RLA, chose to avert potential litigation over this issue by express provision. Congress did not thereby, or by carrying § 77(n) forward into the Bankruptcy Act, invite the inference that trustees not subject to the RLA would be exempt from a provision, such as § 8(d) of the NLRA, similar to § 6 of the RLA, where no such comparable provision was in existence or so much as a gleam in Senator [then Mr.] Taft's eye.[13]

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[13] It has also been contended that the 1978 Bankruptcy Code silently approved the "new entity" theory (discussed at the outset of this brief) because the Second Circuit had already decided *Kevin Steel*. As a matter of general principle, it is not creditable to suppose that when Congress is engaged in an elaborate reformation of the law in a large area, all appellate decisions dealing with that subject that may have come to its attention and that are not disapproved, are ratified, even if the course of decision was uniform. But the ratification argument fails totally where the law on a given subject is in disarray, for the argument inevitably leads to the question "*What* decisions are being ratified?" As previously shown, *Kevin Steel* and its progeny were far from the only relevant decisions extant as of 1978. The law consisted also of the NLRB decision that a trustee in bankruptcy is the alter ego of the bankrupt employer as well as other decisions holding trustees in bankruptcy subject to the NLRA in accordance with § 2(1) thereof. See pages 9-10, *supra*. Finally, Congress acted in 1978 against the general background of the bankruptcy law which did not excuse bankruptcy trustees from obedience to public law, see pages 15 to 21, *supra*.

CONCLUSION

For the foregoing reasons the decision below should be reversed.

Respectfully submitted,

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Nos. 82-818 & 82-852

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION, ET AL.,
Respondents.

LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD AND BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF AS AMICUS CURIAE AND SUPPLEMENTAL BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

The American Federation of Labor and Congress of Industrial Organizations respectfully moves the Court for leave to file the accompanying supplemental brief *amicus curiae* in support of the petitioners in this case. The purpose of this motion is to call to the Court's attention very recent developments which demonstrate that the ruling of

the court below is already having serious adverse effects on collective bargaining. These events refute the easy assurances, expressed in respondents' brief and in a brief *amicus* filed in their support, that employers would not utilize the bankruptcy laws to avoid their obligations under collective bargaining agreements as stated in the national labor laws.

This motion and brief will be served by hand or express mail on counsel for all parties.

CONCLUSION

For the above stated reasons, this motion for leave to file a supplemental brief *amicus curiae* should be granted.

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SUPPLEMENTAL BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

This supplemental brief amicus curiae is filed contingent on the granting of the foregoing motion for leave to file this supplemental brief.

ARGUMENT

1. In our opening brief, we stressed that the National Labor Relations Act and the Labor Management Relations Act establish a dual regime with regard to the ne-

gotiation and renegotiation of collective agreements: Section 301 provides for rules that, like the common law of contracts, are designed "to assure adherence to contract terms." *Chemical Workers v. Pittsburgh Glass*, 404 U.S. 167, 187. Those rules, again like the law of contracts generally, are enforceable through the "usual processes of the law." *Dowd Box Co. v. Courtney*, 368 U.S. 502. Section 8(d), in turn, states a *second* set of rules that have a "more specialized purpose than merely promoting general contract compliance"—*viz.*, to "*facilitate agreement in place of economic warfare.*" *Pittsburgh Glass*, 404 U.S. at 187. This second set of rules, like the rest of the regulatory scheme governing the collective bargaining process, is not subject to the "usual processes of the law" but to the system for administering public rights and obligations specially designed by Congress for this purpose. See *Nat. Licorice Co. v. Labor Board*, 309 U.S. 350, 364. Section 8(d)'s essence, in short, is to state public law rules concerning the times at which there must be economic peace and the times at which the parties may initiate economic warfare and the forms that must be followed in so doing. The requirement that the *status quo* with regard to mandatory bargaining subjects be maintained during certain periods embodies Congress' conclusion that neither management nor labor should be free to set in motion the process of "collective bargaining with the right to strike at its core" (*Bus Employees v. Missouri*, 374 U.S. 74, 82) during the term of a collective agreement. Congress' rejection of the concept of "continuous collective bargaining" in favor of a concept of industrial stability applies equally as a restraint on unions in good times and on employers in bad times.

We argued, too, that the authority of the bankruptcy court to relieve a debtor-in-possession of the obligations stated in § 8(d) is no different from the authority of the bankruptcy court to relieve debtors-in-possession of the public law obligations generally. It "has been generally held that federal statutes regulating business in the pub-

lic interest are equally applicable when the business is run by trustees or receivers." *Cullen v. Bowles*, 148 F.2d 621, 623 (C.A. 2).

Finally, we pointed out that the maintenance of the public law rules designed to further industrial peace is entirely compatible with the language, legislative history, aims and purposes of the Bankruptcy Code. Where employers miscalculate and, by repudiating a collective agreement, initiate economic warfare with a strong and determined union, the result is not conducive to a successful reorganization; and, as the history of labor relations shows, and as the present events described herein confirm, it is customary for employers to calculate their advantages as best they can and to seize those advantages without regard to the overall interest in furthering the national labor policy formulated by Congress.

2. Respondents' brief attempts to dispute the foregoing by arguing that the prospect of obtaining rejection of a collective bargaining agreement is *not* sufficient, by itself, to encourage employers to abuse Chapter 11 procedures:

> The fears voiced by the Union that the test formulated by the Third Circuit will encourage solvent employers to file Chapter 11 petitions in a bad faith attempt to rid themselves of the obligations imposed by collective bargaining agreements are groundless. It is unlikely that many solvent businesses will subject themselves to the strict creditor scrutiny and court control which Chapter 11 imposes merely in an attempt to escape the terms of labor agreements. [Brief for Respondents, p. 26, n.8.]

Similarly, *amicus curiae* Chamber of Commerce assures the Court that the incentives for negotiation are best protected by the approach adopted by the court below. (Chamber Br. p.14).

Recent developments, discussed below, demonstrate that these assertions are unfortunately not correct. The lower

court holdings allowing rejection have indeed encouraged employers to look to the bankruptcy court as a forum for achieving otherwise unattainable labor goals.

3. On September 24, 1983, Continental Airlines,[1] the eighth largest American commercial air carrier, filed a Chapter 11 petition in the Southern District of Texas. *In re Continental Air Lines, Inc., et al.*, Bankruptcy Court S.D. Tex., No. 83-04020-H1-5. The Company immediately abrogated its collective bargaining agreements covering its several thousand pilots, flight attendants, and machinists. Wage rates were cut from 45 to 50 percent and new emergency work rules were implemented. *New York Times*, September 28, 1983, p. D6.

Continental readily conceded that it was not confronted with a cash or credit crisis and that its sole objective in filing its Chapter 11 petition was to overturn its labor agreements. As Continental's chairman and President Frank Lorenzo put it, "it wasn't a problem of insufficient cash. . . . Our sole problem was labor." *Wall Street Journal*, September 26, 1983, p. 1.

Continental did not obtain a rejection order prior to implementing unilateral changes in its labor agreements. Rather, Continental, in a letter to the pilots' union, plainly drafted by attorneys familiar with and eager to exploit the rule announced in the decision below, wrote:

> As you have been advised, at 6:30 p.m., (C.D.T.) on September 24, 1983, Continental Air Lines, Inc. and

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[1] The labor relations of Continental Airlines are subject to the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq.* This difference is immaterial however, since, like § 8(d) of the NLRA, § 6 of the RLA, one of its status quo provisions, severely restricts employers and unions from making unilateral changes during the life of an agreement:

> The Act's status quo requirement is central to its design. Its immediate effect is to prevent the union from striking and management from doing anything that would justify a strike. [*Shore Line v. Transportation Union*, 396 U.S. 142, 150]

> Texas International Airlines, Inc. ("the Company") filed in the United States Bankruptcy Court for the Southern District of Texas petitions for reorganization pursuant to Chapter 11 of the U.S. Bankruptcy Code. As of that time, the Company became a "Debtor-In-Possession" charged with responhibility for prudently administering the assets of the Company pending reorganization.
>
> It is the intention of the Debtor-In-Possession to continue without interruption the operations of at least a portion of Continental's flight schedule. Enclosed for your information are copies of emergency work rules which the Debtor-In-Possession is promulgating and implementing immediately in order to define wages, hours and work rules for all employees in continuing in the active service of the Company as Debtor-In-Possession.
>
> * * * *
>
> The emergency work rules also constitute a proposal for a new Agreement with your organization by the Debtor-In-Possession in accordance with the provisions of Section 6 of the Railway Labor Act. While the Debtor-In-Possession is prepared to negotiate for inclusion in a new Agreement of certain non-economic sections of the Company's prior Agreement(s) with your organization (e.g., seniority system, grievance-arbitration procedure, union security provisions), the Debtor-In-Possession is not prepared to assume that prior Agreement and expressly disclaims any intention to do so.[2]

As these events illustrate, the Court of Appeals ruling in this case removes any incentive for a distressed employer to bargain with a union over reductions in terms and conditions of employment. There is no reason to negotiate with the union when the Company can unilater-

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[2] Letter dated September 24, 1983 from Tom Matthews, Vice President-Employee Relations, Continental Airlines, to Captain Larry Baxter, MEC Chairman, Air Line Pilots Association, International.

ally implement changes after filing its Chapter 11 petition. This is precisely what has occurred at Continental. As the *Wall Street Journal* recently reported, Continental presented its cutback package to the unions on a take it or leave it basis. When the unions declined to accept, the Company filed its petition and implemented the cutbacks unilaterally. *Wall Street Journal*, September 27, 1983, p. 14.

4. The recent conduct of Eastern Airlines further demonstrates that the *Bildisco* precedent is having a significant adverse impact on collective bargaining relationships even where no Chapter 11 petition is filed. On September 27, 1983—three days after the Continental filing—Eastern's chairman Frank Borman demanded that the unions representing most of Eastern's 37,500 employees agree to a 15% pay cut. In a videotaped message to Eastern employees Mr. Borman specifically threatened to file a Chapter 11 petition—in his words "a la Continental"—if the pay cut proposal were refused. *Wall Street Journal*, September 29, 1983, p. 33.

5. Obviously, none of these employer actions are consistent with the public policy of substituting agreement for economic warfare. Indeed, at this writing Continental's pilots, flight attendants, and machinists are engaged in a nationwide strike. *New York Times*, October 3, 1983, p. B13. Unions representing Eastern's employees have vowed to resist the Company's demand for wage reductions. *Wall Street Journal*, September 28, 1983, p. 4. **By sanctioning employer repudiations of collective bargaining agreements, the courts below have undermined national labor policy without advancing national bankruptcy policy.**

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

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QUESTIONS PRESENTED

1. Does federal labor policy impliedly exempt union workers from sharing the burden of a Chapter 11 reorganization unless the bankrutpcy court finds that the maximum possible sacrifices by nonunion workers and other creditors will be insufficient to save the company?

2. Should the lengthy and complex procedures for midterm contract modification established by Section 8(d) of the National Labor Relations Act be imported into reorganizations under Chapter 11 of the Bankruptcy Code?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

Nos. 82-818 and 82-852

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION, ET AL.

LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ETC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE AMICUS

In this consolidated case, petitioner National Labor Relations Board (NLRB) and petitioner Local 408, International Brotherhood of Teamsters (Union) are urging this Court to rule that union employees must be exempted from sharing any of the burdens of a reorganization unless the bankruptcy court finds that imposing the maximum possible sacrifices upon nonunion personnel and other nonsecured creditors will not suffice to save the employer. Moreover, the Union is urging that the complex and lengthy procedures for terminating collective bargaining agreements should be superimposed on

the statutory procedures for rejecting the executory contracts of a debtor.

Accepting petitioners' positions would make reorganizations under Chapter 11 of the Bankruptcy Code impractical, unfairly distribute the inherent burdens of reorganization, and seriously distort national labor policy. In addition to being contrary to law and the public interest, such an outcome would prejudice the business community, including many of the members of the Chamber of Commerce of the United States (Chamber), the largest business and professional organization in the United States. Thus, on behalf of its membership, which includes more than 4,000 state and local chambers of commerce and trade and professional organizations as well as 208,000 business firms and individual direct members, the Chamber submits this amicus brief.

Petitioners base their argument primarily upon *Brotherhood of Railway Clerks v. REA Express.*[1] There, without explanation or apparent recognition that it effectively was reversing its own newly established *Kevin Steel* decision calling for a balancing of the equities,[2] a panel of the Second Circuit said that a collective bargaining agreement may not be rejected so that union workers may share the burdens of reorganization unless imposing even the maximum possible sacrifices upon non-union employees and other creditors would be insufficient to avoid liquidation.

In the *Bildisco* case now under review, the Third Circuit concluded that the *REA Express* extreme necessity test goes further than is necessary to accommodate the Bankruptcy Code to federal labor policy. While agreeing that labor contracts merit special consideration, the Third Circuit declined to foreclose threshold consideration of the sacrifices being made by other workers and

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[1] 523 F.2d 164 (2d Cir.), *cert. denied*, 423 U.S. 1017 (1975).

[2] Shopman's Local Union No. 455 v. Kevin Steel Products, Inc., 519 F.2d 698 (2d Cir. 1975).

creditors. Instead, citing the Second Circuit's *Kevin Steel* precedent which predated *REA Express*, it held that rejection should be permitted where the trustee or debtor-in-possession proves that (1) the labor contract is burdensome to the business to be reorganized, and (2) rejection would be equitable in view of all the circumstances, including the burdens being shared by other workers and creditors. That holding recently has been approved by the Eleventh Circuit in *In re Brada Miller Freight Systems, Inc.*[3]

The Chamber believes that the flexible approach of the Third and Eleventh Circuits and the early Second Circuit precedent, fully accommodates federal bankruptcy and labor policy. The more extreme and inflexible position urged by petitioner would violate both policies and be seriously unfair to nonunion personnel and other creditors. The flexible approach of the Third and Eleventh Circuits will not deprive any union of the rights to recognition, to engage in good faith bargaining, or to strike; all of those rights survive rejection of a labor contract. Nor will that approach foster antiunion animus—of which there is no hint in this record—since the bankruptcy courts will assure that any rejection is made in good faith. Accordingly, the Chamber urges this Court to affirm the Third Circuit decision under review.

SUMMARY OF THE ARGUMENT

Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101 et seq., reflects Congress' judgment that the best means of preserving jobs and maximizing recovery by all creditors is to reorganize insolvent businesses.[4] Rejection of

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[3] 702 F.2d 890 (11th Cir. 1983).

[4] The operation of Chapter 11, and the role of the debtor-in-possession, are discussed in United States v. Whiting Pools, Inc., —— U.S. ——, 51 U.S.L.W. 4705, 4706-08 (June 8, 1983). There, the Court noted that an important objective of Chapter 11 was to preserve jobs, *id.* at 4707, and held that Chapter 11 had primacy over procedures otherwise applicable to enforcement of federal tax

burdensome executory contracts under Section 365(a) is a central feature of such reorganizations. Burdensome collective bargaining agreements, which often are the major obstacle to a debtor's economic vitality plainly are within Section 365(a). Thus, foreclosing a reasonable rejection of such contracts strikes at the very heart of Chapter 11 and must be supported by compelling justification.

There is no dispute here that federal labor policy justifies giving some special consideration to collective bargaining agreements. Instead, the issue is the extent to which Chapter 11 must be impaired to accommodate that policy. The Third and Eleventh Circuits have concluded that labor policy is adequately served by adding to the traditional "burdensomeness" standard a requirement that the bankruptcy court balance all of the competing equities, giving weight both to the special interests of employees and to the sacrifices being imposed on others. Petitioners seek to go further, however, erecting a rigid threshold bar to rejection unless that is the only possible way to avoid liquidation.

While petitioners never expressly recognize this, the effect of the proposed extreme necessity test would be to force the bankruptcy court to attempt to squeeze all possible sacrifices out of nonunion personnel and unsecured creditors before requiring union workers to share any of the burdens of reorganization. This harsh discrimination is contrary to the fundamental labor policy of neutrality between union and nonunion employees, as well as the bankruptcy policies of fairness and equity. The discrimination is not necessary to preserve labor peace, but,

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liens. Contrary to the suggestion of the NLRB's Petition for Certiorari (at 25) rejection of a collective bargaining agreement does not leave workers without protection. Claims accruing prior to filing are entitled to the statutory priorities established for employees by 11 U.S.C. § 507. Claims accruing after filing and before rejection are costs of administration entitled to priority over all but secured creditors. 11 U.S.C. § 507(a)(1).

if anything, may provoke unrest. And far from promoting collective bargaining, the possibility of avoiding all of the burdens of reorganization gives unions a strong incentive to refuse to negotiate over their fair share of the burdens. In short, the proposed test is so extreme that it would violate both labor and bankruptcy policy.

The petitioning Union—but not the NLRB—seeks further to insulate union workers from sharing the burdens of reorganization by requiring trustees or debtors-in-possession to comply with Section 8(d) of the National Labor Relations Act; 29 U.S.C. § 151 et seq. ("NLRA"), which establishes lengthy and cumbersome procedures for contract renegotiation, before seeking rejection. As the NLRB recognizes, however, this would be impractical and would unduly impair Chapter 11 because of the two-month delay and uncertain benefits involved. Moreover, it would not advance the limited purposes of Section 8(d), *e.g.*, to provide a limited "cooling off" period, to prevent "quickie" strikes seeking to force mid-term contract concessions.

Accordingly, the Chamber urges this Court to approve the standards for the application of Section 365(a) adopted by the Third Circuit in this case and the Eleventh Circuit in *Brada Miller*, and to reject both the extreme threshold test proposed in *REA Express* and the Union's attempt to engraft Section 8(d) onto Section 365(a). The Chamber takes no position on the other issues in this case.[5]

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[5] The NLRB asserts in its preliminary discussion of the law that economic hardship short of bankruptcy never excuses any failure to perform any obligation imposed by a collective bargaining agreement. Brief for the National Labor Relations Board, National Labor Relations Board, Petitioner v. Bildisco and Bildisco, Debtor-In-Possession, No. 82-818 and Local 408, International Brotherhood of Teamsters, Petitioner v. National Labor Relations Board, No. 82-852 (May, 1983) ("NLRB brief") at 17. This Court has never so held, and this is not the case for that issue to be decided. A simple default under a contract cannot be equated with a rejection under Section 365(a).

ARGUMENT

I. THE HARSH DISCRIMINATIONS AND INFERIOR PLANS OF REORGANIZATION MANDATED BY THE MECHANICAL THRESHOLD TEST URGED BY PETITIONERS ARE CONTRARY TO FEDERAL BANKRUPTCY AND LABOR POLICIES AND SHOULD BE REJECTED.

Petitioners assert that the threshold extreme necessity test is compelled by the policies of the NLRA, but they fail to examine the practical effects of that test. In fact, the proposed test will inflict harsh and unnecessary discrimination on nonunion workers and other creditors and otherwise will frustrate the policies of both the NLRA and the Bankruptcy Code.

A. The Proposed Test Compels Bankruptcy Courts To Squeeze All Possible Sacrifices Out of Nonunion Employees Without Regard for Competing Equities Before Assigning Any Burden to Union Employees.

A debtor's work force never consists solely of union workers covered by a collective bargaining agreement. By law, supervisors and managers are excluded from the coverage of such agreements. Moreover, it is quite common for only some worker groups to be unionized while others are not, even in the same facility.

Under the proposed extreme necessity test, the bankruptcy court would have to prefer *any* possible alternative that might avoid liquidation while preserving the labor contract. Thus, the bankruptcy trustee or debtor-in-possession first would have to attempt to squeeze the *entire* amount of any necessary reduction in labor costs from the *nonunion* employees. Only if this proved impossible could the collective bargaining argument be rejected so that a share of the burden could be assigned to workers under a collective bargaining agreement. For example, if an immediate, short term 10 percent reduction in total labor costs were necessary and half of the

work force were unionized, the court would have to require the trustee or debtor-in-possession either to reduce nonunion wages by 20 percent while leaving union wages unchanged or prove that this was impossible.[6]

Similarly, a debtor generally will have an array of unsecured creditors. Among these may well be nonunion employees as well as many small businesses or sole proprietorships. Under the proposed threshold test, the bankruptcy court would have to completely deny these creditors any repayment if that would permit a possibly successful reorganization without any reduction in the wages or benefits of union workers. The court could not consider the resulting hardship to these businesses and their employees, nor could it give weight to such federal policies as those of encouraging small business.[7]

This type of discrimination occurred in *In re David A. Rosow, Inc.*[8] There the debtor had reduced the wages of 125 nonunion workers by 10 percent and proposed to do the same with respect to the 12-14 workers covered by a Teamsters contract. The bankruptcy court did not question that substantial labor cost reductions were necessary. Nevertheless, it refused to allow rejection, saying that the union workers were such a small component of the total work force, it could not conclude that it was necessary for their wages to be reduced. The NLRB cites

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[6] Many permutations of this basic pattern readily come to mind. For example, there may be several unions, some of which have consented to reductions while others have refused. Or one union's contract fortuitously may be expiring while another's has years left to run. In each case, the common result is serious inequity in which some employees get a free ride on the sacrifices of others simply because the terms of their employment are set by a collective bargaining agreement rather than by some other form of contract.

[7] This strong policy amply is evidenced by the Small Business Act, 15 U.S.C. § 631(a) (1976). (The "Government should aid . . . and protect, insofar as is possible, . . . small business concerns . . .")

[8] 9 B.R. 190 (Bankr. D. Conn. 1981).

Rosow as a case that "accepted and applied" the standard it is urging here.[9]

The petitioners' briefs do not even acknowledge, much less try to defend, this discrimination against nonunion workers. The NLRB brief asserts, however, that commercial debtors properly are subjected to discrimination because they can "spread risk among numerous customers." [10] This is an unsupportable and inaccurate generalization. Many small businesses and sole proprietorships operate as satellites of only one or a few major customers. Moreover, the amount such creditors stand to lose often will far exceed the claims of any single worker and may suffice to force them into bankruptcy also, causing their employees to lose their jobs as well. Thus, it often may be most equitable to distribute a share of the burden over the members of a unionized work force in order to permit partial repayment of other creditors.

In short, bankruptcy is a situation that calls for flexibility and balancing, not for rigidity. To the extent that these equities are important, they can only be evaluated on a case-by-case basis. But the *threshold* extreme necessity test urged by petitioners generally will preclude these equities from being considered. As discussed below, the result is to violate basic policies of both the NLRA and the Bankruptcy Code.

B. The Effects of the Proposed Threshold Test Would Violate Federal Labor Policy.

Without ever fully acknowledging the nature and severity of the discrimination the proposed test would inflict, petitioners assert that any unfairness or injury is justified by federal labor policy. In fact, considerations of federal labor policy alone would dictate that the test be rejected.

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[9] NLRB Brief at 24 n.13.

[10] *Id.* at 22.

1. *The discrimination against nonunion workers mandated by the proposed test violates the strong labor policy of neutrality between union and nonunion workers.*

The discrimination inflicted by the proposed test against workers who have elected not to engage in collective bargaining violates one of the most basic policies of the NLRA. Section 7 of the NLRA expressly guarantees to employees the right to make an unfettered choice whether to engage in collective bargaining or "to refrain from any or all of such activities." [11] This reflects a Congressional judgment that the government should remain "wholly neutral" as to whether or not employees should unionize and bargain collectively.[12]

Pursuant to this policy, the Board repeatedly has held that its representatives must display complete neutrality and impartiality with respect to unionizing campaigns and elections.[13] Indeed, the Board has assigned this policy such high priority that, from time to time, it has found that conduct by private parties which created the false appearance of Board support for unionization was a sufficient basis to invalidate a representative election.[14]

The policy of neutrality does not mean that union employees must be denied the normal incidents of working

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[11] 29 U.S.C. § 157 (1976).

[12] NLRB v. Savair Mfg. Co., 414 U.S. 270, 278 (1973). *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937) ("[The NLRA] goes no further than to safeguard the right of employees to self-organization . . . for collective bargaining . . . without restraint or coercion . . ."). *See also* Local 57 ILGWU v. NLRB, 374 F.2d 295, 300-01 (D.C. Cir. 1967) (Burger, J.), *cert. denied*, 387 U.S. 942 (1967) (this neutrality is "one of the Act's most basic policies").

[13] Allied Electric Products, Inc., 109 N.L.R.B. 1270 (1954); Rebmar, Inc., 173 N.L.R.B. 1434 (1968).

[14] *See, e.g.*, Allied Electric Products, 109 N.L.R.B. at 1272 ("no participant . . . should . . . suggest . . . that this Government Agency endorses a particular choice").

under an employment contract. To the contrary, the NLRA legitimated collective bargaining precisely so workers could seek such contracts if they so chose.[15] It does mean, however, that the federal government generally should not tip the scales toward or against unionization, particularly through economic inducements.

It is consistent with the policy of neutrality to allow workers covered by collective bargaining agreements whatever benefits may be accorded other parties to executory contracts. While this may give union workers some claims against the estate not shared by workers whose terms of employment are established more informally,[16] that is a normal result of the way contracts are treated in bankruptcy. The policy of neutrality is violated, however, if the bankruptcy court confers special valuable protection on some employees, while imposing additional sacrifices on others, simply because the favored group chose to engage in collective bargaining. That is *not* a normal incident to contracting, since burdensome executory contracts generally are subject to rejection under Section 365(a). Instead, it is an improper discrimination inflicted upon the disfavored employees flowing solely from their protected decision not to unionize.

2. This discrimination is not necessary to preserve labor peace by fostering collective bargaining.

Petitioners' argument that these results are compelled by the federal policy favoring collective bargaining is

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[15] *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. at 57 (1937).

[16] It should not be assumed that nonunion workers never have employment contract rights. Some, such as salesmen, may have express, individual contracts. Others may have contractual rights established by reliance upon personnel manuals or otherwise. The existence and validity of such contracts is, of course, a matter of state law. *See, e.g.*, Belknap, Inc. v. Hale, —— U.S. ——, 127 DLR D-1 (June 30, 1983) (sustaining state contract action by nonunion strike replacements).

specious. As recognized by the NLRB [17] and the Union,[18] the underlying purpose of authorizing collective bargaining was to preserve labor peace. While that goal could be frustrated by arbitrary or excessive impairments of collective bargaining agreements, there is no reason to believe that subjecting such agreements to termination in the special circumstance of a Section 11 reorganization would have that result.[19] Indeed, if anything is likely to provoke labor unrest, it is subjecting one class of workers to seriously discriminatory treatment while exempting another class, which is just what the proposed test does.

The NLRB made a similar policy argument in its efforts to persuade this Court that when a business changes hands the new owner routinely should be held to its predecessor's collective bargaining agreement.[20] This Court rejected that result because (i) it was contrary to normal principles of contract law and (ii) would "discourage and inhibit the transfer of capital." [21] Instead, it concluded that the policies favoring collective bargaining were adequately preserved by allowing a new owner who intends to continue the same business to set initial terms of employment but requiring it to recognize the incumbent union and bargain over subsequent

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[17] NLRB brief at 18.

[18] Union brief at 29.

[19] The debtor-in-possession will have a strong interest in avoiding a crippling strike, *see infra* at I.B.3., and the bankruptcy court will evaluate the risk of a strike in deciding whether to allow rejection. If, as the NLRB (NLRB brief at 42) and the Union (Union brief at 31) insist, the union generally will be eager to bargain, there is even less risk.

[20] *See, e.g.*, NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1972).

[21] *Id.* at 287-88.

changes if the new owner hires a majority of the previous owner's employees.[22]

As discussed by the court below, there is a strong argument to be made that a trustee or debtor-in-possession is a "new entity" to which the debtor's assets have been assigned. This would suggest that the trustee or debtor-in-possession is a successor which *automatically* should have the right to establish new terms of employment.[23] But this Court need not go so far to uphold the Third Circuit in this case. Instead, the rationale of *Burns* may be applied because (i) all executory contracts normally are subject to rejection under 365(a), and (ii) permitting such a rejection to further a Section 11 reorganization will both encourage the transfer of capital to the debtor and foster the purposes of the Bankruptcy Code. That rationale is more than sufficient to overcome any policy favoring enforceability of collective bargaining agreements, at least to the extent contemplated by the Third Circuit, without regard to the status of the trustee or debtor-in-possession.[24]

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[22] The duty to bargain arises only if a majority of the previous work force is retained and other conditions are met. *See* NLRB brief at 34 n.19.

[23] The Board's attempt to equate the debtor-in-possession with an "alter ego" is totally unpersuasive. That doctrine is directed toward formal changes in ownership made in a sham attempt to go nonunion. Carpenters Local No. 1846 v. Pratt-Farnsworth, 690 F.2d 489, 507-08 (5th Cir. 1982) (collecting cases); *see* Southport Petroleum Co. v. NLRB, 315 U.S. 100, 106 (1942) ("disguised continuance"). In contrast, a Chapter 11 reorganization must be done in good faith and produces a profound effect on the creditor. Moreover, the trustee or debtor-in-possession must act for the benefit of the creditors, a distinct and substantial change from the employer's pre-filing obligations. *Cf.* Unit Parts Co., 10 B.R. 970, 979 (Bankr. W.D.Okla. 1981) (debtor-in-possession not an alter ego).

[24] This Court has admonished that the *Burns* decision reflects broad policy considerations rather than legal technicalities, and that the concept of "successor" should vary with the circumstances. Howard Johnson Co. v. Detroit Local Joint Exec. Bd., 417 U.S. 249,

Indeed, the Eleventh Circuit expressed the view that the considerations discussed in *Burns*, especially the need to facilitate "the most efficient use of the nation's resources," apply in the bankruptcy context "with perhaps even greater force." [25] Accordingly, the Eleventh Circuit concluded it was critical not to place collective bargaining agreements in a "stranglehold position" that "would often . . . [make it] . . . impossible to induce fresh management and capital to participate in the revitalization of a bankrupt enterprise." [26]

Because the NLRB's policy argument here has the additional weakness of inflicting harsh discrimination against nonunionworkers, it is much less tenable than in *Burns* where it was rejected in favor of the policy favoring a free flow of capital. Moreover, as shown below, the NLRB's position here actually undermines collective bargaining.

3. *In fact, the proposed test would remove important incentives to collective bargaining that the approach of the Third and Eleventh Circuits preserves.*

The approach of the Third and Eleventh Circuits preserves important incentives to collective bargaining that the proposed test eliminates or seriously weakens. Thus, contrary to petitioners' claims, that approach better serves the goal of encouraging unions and employers to resolve

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262-63 n.9 (1974). The NLRB tacitly concedes that the rationale of the successorship cases applies to the present case. NLRB brief at 38 n.25.

[25] Brada Miller, 702 F.2d at 897. Surprisingly, the *REA Express* decision includes very similar language to the effect that the principles underlying *Burns* are "particularly applicable" in bankruptcy. 523 F.2d at 170.

[26] Brada Miller, 702 F.2d at 897.

their differences by collective bargaining—as opposed to petitioners' goal of favoring union workers.

As a general proposiiton, an employer who is approaching insolvency is more than willing to negotiate wage and benefit reductions with a union. If significant union concessions can be obtained, that often will persuade creditors to accept informal arrangements that will avoid the necessity for bankruptcy. And even if bankruptcy cannot be avoided, a prior favorable modification of the collective bargaining agreement greatly increases the prospects for a prompt and successful reorganization.

On the other hand, a union has strong disincentives to negotiate such concessions. Obviously, it would prefer to maintain the wages and benefits of its members if at all possible. Beyond that, it may fear that entering negotiation will be seen as a sign of weakness and ineffectiveness. And if the local union is part of a larger organization, as is true in this case, it may well be under very strong pressure to avoid setting an area or national precedent.

The proposed threshold extreme necessity test would greatly magnify these disincentives to bargaining by holding out the prospect that, even if the employer were forced into reorganization, union workers still might avoid any of the burden. Thus, contrary to the suggestion in the NLRB brief [27] the prospect of an impending reorganization would not suffice, in itself, to bring a union to the bargaining table.[28] Instead, a shrewd union

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[27] NLRB brief at 42-43.

[28] The NLRB tacitly concedes this by arguing that "the union . . . shares the employer's interest in ensuring the preservation of the business; if the business fails, the employees lose their jobs." *Id.* at 42. In other words, it is only when union concessions are absolutely necessary to prevent liquidation that the union would be motivated to bargain under the proposed test. The NLRB brief does not even acknowledge that local unions often may be under pressure from their parent organizations to refuse concessions to a particular employer because of the precedent that would be set.

would bargain only if it believed that a bankruptcy court would find that union concessions were absolutely necessary to avoid liquidation. In a doubtful case, the union would have to consider whether the benefits of bargaining immediately outweighed the chance to avoid all burdens of reorganization, and often would opt not to bargain.

In contrast, the approach of the Third and Eleventh Circuits encourages the union to consider bargaining whenever there is a threat that the employer may face insolvency. Early bargaining offers the union the chance to participate in framing modifications which may either render the labor contract non-burdensome or convince the court that setting it aside would be inequitable. And early bargaining will not be discouraged by the hope of absolute protection that would be offered by the test petitioners are proposing. Thus, it is the approach of the Third and Eleventh Circuits, rather than the threshold extreme necessity test, that most effectively encourages collective bargaining in this situation.

C. The Proposed Test Also Would Violate the Bankruptcy Code's Policies of Fairness, Equitability, and Feasibility.

The fact that petitioners' proposed threshold extreme necessity test would violate federal labor policy is reason enough to reject it, since no other justification has been offered. But even if the test would advance labor policy to a degree—and it would not—any such advance would be more than offset by the serious violence the test would do to basic policies of the Bankruptcy Code.[29]

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[29] *See* Southern Steamship Co. v. NLRB, 316 U.S. 31, 47 (1942) ("[T]he Board has not been commissioned to effectuate the policies of the Labor Act so single-mindedly that it may ignore other and equally important Congressional objectives. Frequently, the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another . . ."). The Board's argument that Congress ratified *REA Express* when it adopted the Bankruptcy

This Court has recognized that a bankruptcy proceeding is essentially equitable in nature, and that the role of the bankruptcy court is to "see that injustice or unfairness is not done." [30] A plan of reorganization must be "fair and equitable, and feasible." [31] These goals are reflected plainly in Chapter 11 of the Bankruptcy Code, which authorizes approval of a reorganization plan over a creditor's objection only if it seems likely to succeed and "does not discriminate unfairly, and is fair and equitable." [32]

Plainly, it is unfair and inequitable to adopt a test which has the effect of casting the primary burdens of reorganization on nonunion employees and other creditors while totally exempting union workers. This is not an ordinary or necessary incident of the fact that union employees work under contract, since as both petitioners admit, Section 365(a) expressly permits such contracts to be set aside. Nor does it reflect any difference in the economic status or capacity to absorb loss of the favored and disfavored parties. It is, instead, an unjustified dis-

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Code in 1978 is specious. Since *REA Express* conflicted with *Kevin Steel*, and no other appellate court had addressed the issue, there plainly was no "settled judicial construction" to be ratified. *See* United States v. Powell, 379 U.S. 48, 55 n.13 (1964).

[30] Pepper v. Litton, 308 U.S. 295, 307-08 (1939); *see* In re Economy Cast Stone Co., 16 B.R. 647, 650-51 (Bankr. E.D.Va. 1981).

[31] In re Muskegon Motor Specialities, 366 F.2d 522, 525 (6th Cir. 1966) (quoting 11 U.S.C. § 621 (1976)).

[32] 11 U.S.C. § 1129(b)(1) (Supp. V 1981). Similarly, it has been said that the analogous reorganization provisions of Chapter 13 require "fundamental fairness" to all creditors, In re Beaver, 2 B.R. 337, 340 (Bankr. S.D.Cal. 1980); that "[t]he spirit and letter of Chapter 13 requires that all similarly situated creditors be given equal treatment," In re Cooper, 3 B.R. 246, 249 (Bankr. S.D.Cal. 1980); and that manipulating classes of creditors violates the "policy of equal distribution" and is "unfairly discriminatory." In re Pine Lake Village Apartment Co., 19 B.R. 819, 830-31 (Bankr. S.D.N.Y. 1982).

crimination repugnant to the policies of the Code. As the Eleventh Circuit concluded in *Brada Miller*, "[t]o elevate this single consideration to such a dominant and decisive position allows the issue of rejection to be settled without any consideration of the interests of other parties involved, [and is] a total abdication of the policies behind the bankruptcy laws." [33]

Moreover, the proposed test undermines the work of the bankruptcy court by shifting the attention of the trustee or debtor-in-possession from attempting to develop the reorganization plan that is most likely to succeed to a search for any plan that will preserve the collective bargaining agreement. As the Third Circuit has pointed out, however, reorganization is not so fine a science that the outcome of marginal plans easily is foreseen.[34] Thus, the likely result will be liquidations that could have been avoided, accompanied by total loss of jobs for all employees.[35] This is the point the Eleventh Circuit was driving at when it criticized *REA Express* for precluding "accommodation of the conflicting interests at stake in a rejection proceeding." [36]

* * * *

In short, the decision of the Third Circuit, as endorsed by the Eleventh, fairly accommodates the policies of the federal labor and bankruptcy acts and the interests they protect. The threshold extreme necessity test proposed by petitioners seriously distorts both policies and harshly and unreasonably discriminates against nonunion workers and other creditors and, therefore, should be rejected.

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[33] 702 F.2d at 899.

[34] Bildisco, 682 F.2d at 80.

[35] Alternatively, in cases where liquidation is avoided, the inferior plan of reorganization often will lead only to partial recovery over a prolonged period, perhaps providing only a fraction of the jobs that a robust recovery would produce.

[36] Brada Miller, 702 F.2d at 899.

II. THE LENGTHY AND CUMBERSOME PROCEDURES FOR CONTRACT TERMINATION ESTABLISHED BY SECTION 8(d) OF THE NLRA SHOULD NOT BE IMPORTED INTO CHAPTER 11 OF THE BANKRUPTCY CODE.

In an effort to insulate union workers even further from bearing their fair share of the burdens of a Chapter 11 reorganization, the Union argues that a trustee or debtor-in-possession should be required to follow the lengthy and cumbersome procedures for termination of collective bargaining agreements established by Section 8(d) of the NLRA. 29 U.S.C. § 158(d). Such a requirement would seriously distort both the intent and language of Section 8(d) and would frustrate implementation of Chapter 11. Every appellate court to consider the issue has rejected the Union's position,[37] as has the NLRB—the agency that would have to oversee such 8(d) notice requirements.[38] This Court should do likewise.

Simply stated, Section 8(d) provides that no "party" may "terminate" or "modify" a collective bargaining agreement except pursuant to an elaborate procedure that

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[37] *See* In re Brada Miller Freight System, Inc., 702 F.2d 890, 897 (11th Cir. 1983); NLRB v. Bildisco, 682 F.2d 72, 78 (3d Cir. 1982), *cert. granted*, 103 S. Ct. 784 (1983) (the case presently under review); Brotherhood of Railway Clerks v. REA Express, 523 F.2d 164, 166 (2d Cir.), *cert. denied*, 423 U.S. 1017 (1975); Shopmen's Local Union No. 455 v. Kevin Steel Products, Inc., 519 F.2d 698, 705 (2d Cir. 1975); Local Joint Exec. Bd. v. Hotel Circle, Inc., 419 F.Supp. 778, 789 (S.D. Cal. 1976), *aff'd*, 613 F.2d 210 (9th Cir. 1980).

[38] NLRB brief at 18-19, Union brief at 11. Because of its institutional role and expertise, the NLRB's interpretation of Section 8(d) to exclude coverage of rejections under Section 365(a) is entitled to special deference. Bill Johnson's Restaurants, Inc. v. NLRB, —— U.S. ——, 51 U.S.L.W. 4636, 4639 (May 31, 1983). On the other hand, the NLRB has no institutional role to play in deciding the standards that should govern a Section 365(a) rejection. As to that issue, the courts are expert and should not defer to the NLRB.

imposes a waiting period of 60 days before either party can treat the agreement as terminated; even then the agreement may be considered terminated only if it has expired.[39] This 60-day delay is the very heart of the provision. Thus, this Court explained in *NLRB v. Lion Oil Co.*, the legislative history of Section 8(d) reveals that

> both the sponsors and the opponents of the bill saw in § 8(d)(4) no more than a means of preventing "quickie" strikes by requiring a "cooling-off" period . . .[40]

The inherent delays involved in seeking and obtaining judicial authority to reject a contract under Section 365(a) already provide a "cooling off" period. Thus, the central legislative goals of Section 8(d) would not be served by engrafting it onto the Bankruptcy Code. Moreover, the resulting additional delay and complexity would seriously impair implementation of Chapter 11. Thus, the NLRB correctly concludes that

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[39] The full text of Section 8(d) appears in the NLRB brief, *supra* note 6 at 3-4. The Court should not be misled by the Union's hypothetical discussion of facts with no relation to this case. The debtor-in-possession here is not claiming any right to terminate its labor contract without prior court approval.

[40] 352 U.S. 282, 292 (1957). In *Lion Oil* the Court found it necessary to attribute some additional meaning to the statutory language to avoid incongruity and harmonize it with the rest of the NLRA, but that did not affect its view of the provision's central purpose. The NLRB similarly has viewed Section 8(d) as being narrowly directed at minimizing disruptive "quickie" strikes through a "cooling off" period. Jet Line Products, Inc., 229 N.L.R.B. 322, 323 & n.2 (1977), and cases cited therein. *See also* Proctor & Gamble Ind. Union v. Proctor & Gamble Mfg. Co., 312 F.2d 181, 190 n.9 (2d Cir. 1962), *cert. denied*, 374 U.S. 830 (1963) ("Section 8(d) was intended to provide a cooling off period . . .").

> the elaborate procedure of notices and waiting periods prescribed in Section 8(d) . . . is not well suited to the expeditious determination of whether the bankrupt business can survive without some adjustment in the existing contract.[41]

This plain incompatibility in itself is a more than adequate basis for concluding that Section 8(d) does not apply to Section 365(a) rejections.[42] But there is yet another compelling rationale for this conclusion that has been adopted by both the Second and Third Circuits and which is termed a "useful analytical tool" by the Eleventh Circuit.[43] This is the "new entity" analysis that the NLRB and the Union attack so vigorously.

By its express terms, Section 8(d) applies only to terminations or modifications by a "party" to the collective bargaining agreement. As the Second Circuit pointed out in *Kevin Steel*, however, a trustee or debtor-in-possession is not the same legal entity as the pre-bankruptcy company, but is "a new entity . . . with its own rights and duties, subject to the supervision of the bankruptcy court."[44] Thus, the Second Circuit held that

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[41] NLRB brief at 41. The NLRB states that Section 8(d) never requires a union to bargain during the term of a collective bargaining agreement (*id.*), but this Court has not ruled on that point and need not do so here. For present purposes, it is enough that Section 8(d) can be used to stall and perhaps frustrate reorganization.

[42] The Union argues that bankruptcy proceedings already are so complex and lengthy that a few more months and complications should be acceptable. Union brief, *supra* note 8 at 31-32. The goal should be to reduce, rather than magnify, this complexity, however. *See* Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 137, Pt. I, 93d Cong. 1st Sess. 89 (1973). Moreover, even the Union must concede that where expedition is essential, Section 8(d) must yield to Section 365(a). Union brief, *supra* note 8 at 31, n.*.

[43] Brada Miller, 702 F.2d at 894.

[44] Kevin Steel, 519 F.2d at 704; *see* 8 Collier on Bankruptcy ¶ 6.30-.32; Cramer v. Mammoth Mart, Inc., 536 F.2d 950, 954 (1st

the debtor-in-possession is not a "party" within the meaning of Section 8(d),[45] and the Third Circuit agreed in the present case.[46]

The central point—and one upon which all appellate courts and the NLRB agree—is that Section 8(d) does not govern Section 365(a) rejections. Whether that result is reached by balancing broad policies as preferred by the NLRB and the Eleventh Circuit or by the more specific analysis of statutory language employed by the Second and Third Circuits, the conclusion is the same.

Cir. 1976) ("a separate legal entity . . . [existing] . . . principally for the benefit of the pre-filing creditors"). The Second Circuit was quick to point out that it was not asserting that a debtor-in-possession was a new entity for all purposes. In re Unishops, 543 F.2d 1017, 1018-19 (2d Cir. 1976). Instead, it mean only that when the debtor-in-possession, acting as an officer of the bankruptcy court and under the court's direct supervision, exercised the special power conferred by Section 365(a), it was not acting as a "party" to the contract within the meaning of Section 8(d).

[45] Kevin Steel, 519 F.2d at 704. Although *Brada Miller* criticizes the new entity theory in the context of Section 8(d), it appears to accept the general proposition that the debtor-in-possession is a "new juridical entity" for purposes of "the broad powers granted to a debtor-in-possession under the bankruptcy laws." 702 F.2d at 895 & n.14. Section 365(a) would seem to confer such a power.

[46] Bildisco, 682 F.2d at 78-79. Similarly, Section 8(d) clearly contemplates terminations or modifications arising out of bilateral dealings between the employer and the union. In *Lion Oil*, this Court recognized that "termination" is used in a special sense in Section 8(d). Accordingly, rejection of a collective bargaining agreement pursuant to approval of the bankruptcy court is not the type of termination contemplated by Section 8(d).

CONCLUSION

Petitioners' attempt to give union employees virtually complete immunity from the burdens of a Chapter 11 reorganization at the expense of nonunion personnel and other creditors is contrary to federal labor policy and bankruptcy policies and should be rejected. The flexible approach of the Third and Eleventh Circuits, which recognizes the special interests of employees but permits a broad balancing of all equities in deciding whether to approve rejection of a collective bargaining agreement, better promotes federal labor and bankruptcy policies and should be affirmed.

Respectfully submitted,

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On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA AS AMICUS CURIAE

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MOTION BY THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The International Brotherhood of Teamsters (IBT) hereby moves for leave to file a brief as *amicus curiae* arguing that the decision of the United States Court of Appeals for the Third Circuit was wrongly decided. Bildisco and Bildisco, Debtor-in-Possession, Respondent, has denied its consent to the filing of said brief.

INTEREST OF THE IBT AND ISSUES TO BE COVERED IN ITS BRIEF AMICUS CURIAE

The IBT is an international union comprised of 715 affiliated local unions, including Teamsters Local 408, a Petitioner before this Court. The collective membership of the IBT's affiliates totals approximately 1.8 million working men and women. Some 80,000 to 100,000 different collective bargaining agreements cover Teamsters-represented employees in this country.

The IBT represents many workers in industries which are presently in a state of economic decline. The conflict presented in this case has already and will continue to have a particularly severe impact on these workers. The IBT is vitally interested in the maintenance of sound collective bargaining relationships with bankrupt employers undergoing reorganization and in the preservation of their employees' rights created by collective agreements.

The IBT and its affiliated local unions have recognized the needs of employers undergoing financial problems and have sought to bargain with them to avoid business collapse and loss of jobs. The IBT's experience is that such negotiations are fruitful for all concerned. This results from the proper workings of the collective bargaining system. This system has an important role to play in the reorganization efforts of bankrupt employers.

The IBT thus has a strong stake in the development of a principled body of law regarding the viability of

collective bargaining agreements during bankruptcy proceedings. The IBT is concerned that if rejection of collective bargaining agreements during bankruptcy proceedings is easily permitted, more and more businesses will abuse the procedures to rid themselves of labor contracts. The current record level of bankruptcies makes this a matter of grave concern.

In our view, the lower court's decision in this case, threatens labor-management relations and workers' rights. It conflicts with the federal labor policy of encouraging the maintenance of collective bargaining agreements and proscribing unwarranted judicial interference in labor disputes. It also undermines the important and productive role which free collective bargaining could play in achieving a successful reorganization. The function of the accompanying brief *amicus curiae* is to provide a succinct statement of our position in order to aid the Court in its consideration of these issues of critical importance to workers' rights.

We stress that a debtor-in-possession should be bound to the same labor law and collective bargaining obligations as the pre-bankruptcy employer. Thus, the debtor-in-possession is not free to modify its labor contracts unilaterally, without the participation of the Union. Given the unique status of collective bargaining agreements, rejection of collective bargaining agreements by the debtor-in-possession should be permitted by the bankruptcy court only if it is necessary to save the business from collapse, and even then, only after bargaining in good faith with the Union. In short, bankruptcy proceedings should not detract from the force of the labor laws. A proper accommodation of the Bankruptcy Code with the National Labor Relations Act requires that collective bargaining obligations be honored to the fullest extent.

CONCLUSION

For the above stated reasons, this motion for leave to file a brief *amicus curiae* should be granted.

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Countryman, *Executory Contracts In Bankruptcy, Part II*, 58 Minn. L. Rev. 479 (1974) 8

La Penna, *Bankruptcy and the Collective Bargaining Agreement*, 29 N.Y.U. Lab. Conf. 169 (1979) 29

Note, *Corporate Reorganization and the Rights of Labor*, 53 Harv. L. Rev. 1360 (1940) 20, 29

Note, *The Labor Bankruptcy Conflict: Rejection of a Debtor's Collective Bargaining Agreement*, 80 Mich. L. Rev. 134 (1981) 8, 9, 12, 15

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Note, *Bankruptcy Law-Labor Law-Rejection of Collective Bargaining Agreements As Executory Contracts In Bankruptcy*, 22 Wayne L. Rev. 165 (1975) 8

NEWSPAPER ARTICLES:

A Louder Union Voice in Settling Bankruptcies, Business Week, Dec. 8, 1980 13

Concessionary Bargaining, Business Week, June 14, 1982 14

Firms Using Bankruptcy To Fight Labor, Wall Street Journal, Mar. 30, 1983 29

G & W Has Received Union Concessions; Plant Closing Averted, Wall Street Journal, July 12, 1982 14

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Teamsters Agree To Tentative Pact With Concessions, New York Times, Jan. 16, 1982 14
The Payoff of Wage Moderation, Business Week, Jan. 18, 1982 14
World Airways Wins Concessions by Union, Los Angeles Times, Nov. 10, 1982 14

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6 *Collier on Bankruptcy* (14th ed. 1978) 22, 28, 29
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BRIEF FOR THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

This brief *amicus curiae* is filed by the International Brotherhood of Teamsters (IBT) contingent on the granting of the foregoing motion for leave to file a brief as *amicus curiae.*

INTRODUCTION AND SUMMARY OF ARGUMENT

These consolidated cases involve the interplay of two comprehensive statutory schemes: the National Labor Relations Act (NLRA), as amended, 29 U.S.C. § 151 et seq., which defines the rights of workers and the method of making, maintaining, and modifying labor contracts, and the Bankruptcy Code (the Code), 11 U.S.C. § 101 et seq., which permits a financially distressed business to reorganize its operation, restructure its debt, and reject its executory contracts. The issues raised concern the right of companies undergoing reorganization to terminate collective bargaining agreements entered into by the pre-bankruptcy company, and the obligation of bankrupt employers to comply with the labor laws.

The case stems from the 1980 bankruptcy of Bildisco, a New Jersey building-supply company. Even before the bankruptcy, the company unilaterally had ceased making pension and welfare payments required by its collective bargaining agreement with Teamsters Local 408. After the company began to operate, with its previous work force, as a "debtor in possession," it continued to withhold these payments; it also withheld contractually required raises and vacation pay. At no time did Bildisco seek to negotiate with the Union about these contractual changes. After the Union filed unfair labor practice charges with the National Labor Relations Board, the company sought bankruptcy court permission to reject its collective bargaining agreement. The bankruptcy court approved the rejection under § 365 of the Code (11 U.S.C. § 365), and the district court affirmed. The NLRB found that the company had committed unfair labor practices by unilaterally changing the terms of the labor agreement, in violation of NLRA §§ 8(a)(1) and (5) (29 U.S.C. §§ 158(a)(1) and (5)).

The Third Circuit Court of Appeals denied enforcement to the Board's order, holding, in effect, that a

debtor in possession is immunized by the reorganization proceeding, and thereby privileged to make unilateral contract changes which would be unlawful outside of bankruptcy. In the consolidated bankruptcy case, the court held that collective bargaining agreements may be rejected under § 365 of the Code, notwithstanding the conflicting requirements of NLRA §§ 8(a)(5) and (d) (29 U.S.C. § 158(a)(5) and (d)) which govern modification and termination of collective bargaining agreements. Moreover, the court rejected the Union's arguments that a company must first bargain with its employees' representative and then demonstrate that its survival hinges on the contract's termination before it may seek rejection under § 365. The court ruled that the bankruptcy court may approve rejection simply after a " 'thorough scrutiny, and a careful balancing of the equities on both sides.' "

I. The debtor-in-possession is indistinguishable for labor law purposes from the pre-bankruptcy company. *Matter of Brada Miller Freight System, Inc.*, 702 F.2d 890 (11th Cir. 1983). Therefore, it is bound to collective bargaining agreements entered into prior to bankruptcy and by the restrictions of § 8(d), including the prohibition on mid-term contract termination or modification without the consent of the other party. These obligations conflict with Code § 365 authorizing unilateral rejection, with court approval, of executory contracts. The Court must therefore fashion an accommodation of these conflicting provisions and policies.

Treating the debtor-in-possession as a "new entity" not bound by the contract or § 8(d) (*Shopmen's Local Union No. 455* v. *Kevin Steel Products, Inc.*, 519 F.2d 698 (2d Cir. 1975)), is an inaccurate "legal fiction" and sidesteps the statutory conflict and its labor policy implications. The bankruptcy provisions cannot be used to avoid labor law obligations. Thus, unilateral contract changes made without

the consent of the union, prior to a court approved rejection, constitute violations of NLRA § 8(a)(5).

II. A proper accommodation of NLRA § 8(d) and Code § 365 would require that the debtor-in-possession bargain in good faith with the union to impasse before a court could approve contract rejection. If no satisfactory solution were achieved, rejection could then be sought. To allow rejection without this bargaining prerequisite would absolve the debtor-in-possession of any labor law obligations. The collective bargaining process has an important and constructive role to play in the business reorganization context and is flexible enough to adapt to the the exigencies of the business situation. The economic realities make negotiated concessions preferable to outright contract rejection and loss of jobs. Bargaining will benefit the company as well by providing the strong possibility of economic relief and engendering mutual understanding and trust. It will minimize the threat of retaliatory strikes, which unilateral rejection may precipitate, leading to the possible doom of the already ailing company.

III. The public policy basis of national labor laws is that through judicial restraint in labor disputes, the collective bargaining process will be promoted. This will enable workers to achieve an equality in economic power with their employers and will minimize labor strife. Thus, the 1932 Norris-La Guardia Act (29 U.S.C. § 101 et seq.) generally prohibits judicial interference in labor disputes, except in defined circumstances, and then only as a last line of defense, available only if the parties have attempted to negotiate the dispute and failed (§ 8). This § 8 requirement parallels the substantive bargaining duties of NLRA §§ 8(a)(5) and (d) and furnishes further support for our proposed accommodation. Rejection of a labor contract is a blatant form of judicial interference, altering the balance of power heavily in the employer's favor. All indicia show that the reorganization provisions of the bankruptcy law, first enacted in the

1930's concurrently with the NLRA and Norris-La Guardia Act, were not intended to supersede those Acts. Thus rejection should be only a last resort after private settlement efforts have failed.

IV. If negotiations fail, rejection of labor contracts is warranted only if the survival of the business hinges on rejection. *Bro. of Railway Employees* v. *REA Express, Inc.*, 523 F.2d 164 (2d Cir.), *cert. denied*, 423 U.S. 1017 (1975). This test furnishes an objective basis for judging whether what is otherwise prohibited by the labor laws, i.e., the unilateral termination of a labor agreement during its term, is warranted. It would prevent the total elimination of workers' benefits—many of which are noncompensable in money damages—for antiunion or noneconomic reasons. A less stringent test would discourage private adjustment attempts, and would thereby defeat the public policy underlying our labor laws.

ARGUMENT

I. THE DEBTOR-IN-POSSESSION IS INDISTINGUISHABLE FOR LABOR LAW PURPOSES FROM THE PRE-BANKRUPTCY COMPANY

A. The Statutory Conflict Over the Termination Of Collective Bargaining Agreements

The present cases arises from conflict between the language of two statutes promulgating procedures for the termination of collective bargaining agreements: § 365 (a) of the Bankruptcy Code and §§ 8(a)(5) and 8(d) of the National Labor Relations Act.

Under Code 365(a), a bankruptcy trustee, or debtor-in-possession, may, subject to the court's approval, "assume or reject any executory contract or unexpired lease of the debtor." This section allows the trustee or debtor-in-possession to escape burdensome obligations of the debtor in order to facilitate the "fresh start" envisioned by the Code's reorganization provisions.

Section 8(d) of the NLRA prescribes a set of procedures for termination or modifying collective bargaining contracts, including notice to and offering to meet and confer with the other party regarding the proposed modification or termination. The other party is not obligated, however, to discuss or agree to any mid-term contract modification. Failure to abide by the provisions of § 8(d), including any mid-term contract change made without the consent of the other party, constitutes an unfair labor practice in violation of § 8(a)(5) of the Act. On their face, these provisions thus clash with the unilateral termination permitted by § 365.

B. The "New Entity" Theory

The Second Circuit Court of Appeals was the first to consider whether collective bargaining agreements are executory contracts subject to rejection under § 365, notwithstanding the restrictions of NLRA § 8(d) and national labor policy favoring the maintenance of collective bargaining agreements. In *Shopmen's Local Union No. 455* v. *Kevin Steel Products, Inc.*, 519 F.2d 698 (2d Cir. 1975),[1] it tried to sidestep the statutory conflict by resort to a "legal fiction."[2] In its view a debtor-in-possession under Chapter 11 is a "new entity," distinct from the pre-bankruptcy debtor. Analogizing to a successor employer, it reasoned that while the new entity is obligated to comply with the Labor Act, it is not a party to the debtor's collective bargaining agreement,[3] and, therefore,

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[1] *Kevin Steel* arose under § 313 of the Bankruptcy Act (11 U.S.C. § 713) (repealed)) which, for purposes of this case, is identical to § 365 of the Code.

[2] Note, *Bankruptcy and the Rejection of Collective Bargaining Agreements*, 51 Notre Dame Law. 819, 829 (1976).

[3] It relied on *NLRB* v. *Burns Security Services, Inc.*, 406 U.S. 272 (1972), under which a successor employer, while bound to recognize and bargain with the Union, is not generally bound by the substantive terms of the predecessor's labor agreement. Both *Burns*, 406 U.S. at 291, and *Howard Johnson Co.* v. *Hotel Employees*, 417 U.S. 249, 256 (1974), however, suggest that exceptions to this rule exist.

is not bound by the termination restrictions of § 8(d). It is thus free to seek unilateral rejection of its labor agreements. *Id.*, at 704. See also *Bro. of Railway Employees* v. *REA Express, Inc.*, 523 F.2d 164, 167 (2d Cir.), *cert. denied*, 423 U.S. 1017 (1975).

The Ninth and Third Circuits[4] also adopted this concept. In so doing they have avoided the necessity of accommodating the language and purposes of § 365 and § 8 (d). By ignoring the serious policy and practical consequences of allowing rejection in disregard of § 8(d), the courts have endangered interests protected by the labor laws. Moreover, their concept is not legally accurate; nor does it properly harmonize the two statutes.

Most recently, the Eleventh Circuit Court of Appeals considered this issue. Finding the debtor-in-possession to be "indistinguishable for labor law purposes, from the pre-bankruptcy" company, the court rejected the "new entity" theory as a "legal fiction," with "conceptual inconsistencies which compel us to seek an alternative ground for the resolution of the statutory conflict." *Matter of Brada Miller Freight System, Inc.*, 702 F.2d 890, 895-96 (11th Cir. 1983).

As the *Brada Miller* court correctly discerned, at least two paradoxical questions are raised by the "new entity" fiction. First, if the debtor-in-possession is not a party to the contract, why must it nonetheless apply for permission to reject it? Surely, in requiring that the debtor-in-possession seek permission to reject, Congress obviously contemplated that it was a party to the agreement.[5] Sec-

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[4] *Local Joint Executive Board* v. *Hotel Circle, Inc.*, 613 F.2d 210 (9th Cir. 1980); *NLRB* v. *Bildisco*, 682 F.2d 72 (3d Cir. 1982), *cert. granted*, —— U.S. ——, 74 L.Ed.2d 992 (1983).

[5] Similarly, why is the rejection treated as a *breach* of the contract (§ 365(g)(1)) if the debtor-in-possession is not a party to it? "The better interpretation is that Congress authorized rejection under § 365 . . . despite its recognition that the debtor in pos-

ond, if the debtor-in-possession is a "non-party," why is it nonetheless bound retroactively to the agreement and accountable for any breaches if its motion for rejection is denied? *Id.*, at 896 and n.15-17.

The Eleventh Circuit Court of Appeals has not been the sole critic of this flawed concept. Other commentators have decried its inaccuracy.[6] As one observed:

> "[I]t is difficult to see how a debtor-in-possession can be truly distinct from its former self. Where there have been no changes in management, except to introduce overall bankruptcy court supervision, any analogy to successor employer situations seems tenuous." [Note, *Bankruptcy Law—Labor Law—Rejection of Collective Bargaining Agreements as Executory Contracts in Bankruptcy*, 22 Wayne L. Rev. 165, 173 (1975).]

As in this case, the debtor-in-possession is frequently the same management as the debtor,[7] and the same people will generally become the owners of the reorganized company.[8] Indeed, the whole point of the reorganization pro-

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session was a party to the contract . . . ." Note, *The Labor-Bankruptcy Conflict: Rejection of a Debtor's Collective Bargaining Agreement*, 80 Mich. L. Rev. 134, 142 n.46 (1981).

[6] See, Countryman, *Executory Contracts in Bankruptcy: Part II*, 58 Minn. L. Rev. 479, 488 (1974) (new legal entity rationale is a "rather rarified conceptionalism."); Note, *Bankruptcy and the Rejection of Collective Bargaining Agreement*, *supra*, 51 Notre Dame Law. at 329; Note, *The Labor-Bankruptcy Conflict*, *supra*, 80 Mich. L. Rev. at 142-148 (successorship "analogy is unhelpful in the reorganization context and obscures the need to balance the policies underlying the conflicting statutes . . . . The courts would reach sounder results if they recognized the conflict between the Code and the NLRA and resolved cases by balancing the relevant policies." *Id.* at 142-43 and 148.)

[7] The Code itself states: "debtor in possession means debtor . . . ." (11 U.S.C. § 1101)

[8] *See NLRB* v. *Baldwin Locomotive Works*, 128 F.2d 39, 43-44 (3d Cir. 1942) ("where managerial control and economic interest

cedure is to revitalize the existing company. "Debtor-in-possession" is merely a label reflecting the bankruptcy court's temporary supervisory role.[9]

Even the author of the "new entity" concept, the Second Circuit, has realized its limitations and restricted its application since its initial promulgation. In *Matter of Unishops, Inc.*, 543 F.2d 1017, 1018-19 (2d Cir. 1976), the court "caution[ed]" that the "new entity" concept should not be used except in cases involving rejection of collective bargaining agreements.[10]

As another court has said, the new entity theory and successor analogy do not "easily translate into other areas of bankruptcy law." *In re Allied Supermarkets, Inc.*, 6 Bankr. Rptr. 968, 976 n.8 (E.D. Mich. 1980).

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of the debtor in possession and the reorganized company are the same it could be only the blindness of formalism that would" differentiate those entities "so far as the employer-employee relationship is concerned.") In this regard, the reorganized company is generally bound to all executory contracts of the debtor not rejected by the debtor in possession and to all agreements assumed by the debtor in possession. 2 *Collier on Bankruptcy* ¶ 365.03[1] (15th ed. 1982).

[9] It is hardly akin to the typical successor company which purchases its predecessor, become merged into it, or replaces it in supplying a service. *Cf. Burns, supra*, 406 U.S. 272; *Howard Johnson Co.* v. *Hotel Employees, supra*, 417 U.S. 249; *John Wiley and Sons, Inc.* v. *Livingston*, 376 U.S. 543 (1964). Nor are the policy reasons for freeing a successor from its predecessor's labor contracts apt in the reorganization case. See, generally, Note, *The Labor-Bankruptcy Conflict, supra*, 80 Mich. L. Rev. 144-45.

[10] *See also Truck Drivers Local Union No. 807* v. *Bohack Corp.*, 541 F.2d 312, 320 (2d Cir. 1976) ("new entity" theory developed "for the narrow purpose of resolving otherwise conflicting provisions of the labor and bankruptcy laws . . . . Of course, the statement that the debtor is not a 'party', and the analogy to the successor employer, cannot be taken literally, since neither affirmance nor rejection of the collective bargaining agreement would be possible by one not a party to it.")

The "new entity" should be viewed as what it really is, an after-the-fact rationalization of judicially abrogating § 8(d). Given the limited utility of this "legal fiction" (*Matter of Brada Miller Freight System, supra*, 702 F.2d at 897), not to mention its inaccuracy, it is far more logical for this Court to acknowledge that the debtor-in-possession is bound to the agreement, and to § 8(d),[11] and that, therefore, the two statutes do clash. An accommodation serving all purposes can then be designed. As Justice Frankfurter observed in an earlier case involving the interplay of these two laws, "supplying the rule for conflicts unanticipated by Congress is a large part of our work." The task was therefore to find a "practical solution of this question that accomplishes the purposes both of the Bankruptcy Act and the National Labor Relations Act." *Nathanson* v. *NLRB*, 344 U.S. 25, 32 (1952) (dissenting opinion).

C. Unilateral Contract Modifications

If the debtor-in-possession is properly viewed as being indistinct from its former self for labor relations purposes, and thus bound to the debtor's contract and to § 8 (d), then unilateral mid-term contract changes prior to rejection violate § 8(a)(5).[12] In using the "new entity"

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[11] Labor law obligations "can not be avoided by reorganizations, transfers, or any other 'disguised continuance.'" *NLRB* v. *Coal Creek Coal Co.*, 204 F.2d 579, 580 (10th Cir. 1953), *citing Southport Petroleum Co.* v. *NLRB*, 315 U.S. 100 (1942). "[T]he Bankruptcy Act . . . does not authorize a debtor-in-possession to ignore its obligations under the Labor Act." *Kevin Steel, supra*, 519 F.2d at 706. Moreover, NLRA § 2(1) and (2) specify that bankruptcy trustees (or debtors in possession, by definition of Code § 1107) are subject to the Act as "employers."

[12] Even under the successorship analogy, when it is clear that a debtor-in-possession plans to retain substantially all of its employees, as Bildisco did, it must consult initially with their union representative before fixing employment terms. *Burns, supra*, 406 U.S. at 294-95. Failure to do so violates § 8(a)(5) of the Act. *See, e.g., NLRB* v. *World Evangelism, Inc.*, 656 F.2d 1349 (9th Cir. 1981).

theory to immunize the debtor-in-possession from this clear unfair labor practice, the court below ignored the Second Circuit's words of caution that the test be applied only in bankruptcy cases involving the rejection of collective bargaining agreements. *Truck Drivers Local 807* v. *Bohack Corp.*, *supra*, 541 F.2d at 320. Indeed, it specified that the mere filing of a Chapter 11 petition "does not mean that the agreement ceases to exist." Thus, a debtor "may not abrogate a contractual obligation save by statutory or judicial permission." *Id.* at 319.

Under the Code, rejection is permitted *only* with the express approval of the court. Until then, the contract remains in effect,[13] and the debtor-in-possession is obligated to abide by its substantive obligations.[14] Privileging the debtor-in-possession unilaterally to modify the terms of the contract, while the employees continue to perform their end of the bargain, neglects a basic principle of equity, mutuality of obligations and performance. The employer is free to dictate new terms of employment, but employees, with no option short of quitting their jobs, are bound at the whim and caprice of their employer to continue to furnish valuable services under terms to which they have not agreed. *See In re W.T. Grant Co.*, *supra*, 620 F.2d at 320. This substitutes a system of workplace democracy for one of management autocracy.

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[13] 2 *Collier on Bankruptcy*, ¶ 365.03 (15th ed. 1982). *In re W.T. Grant Co.*, 474 F. Supp. 788, 793 (S.D. N.Y. 1979), *aff'd. per curiam*, 620 F.2d 319, 321 (2d Cir. 1980), *cert. denied*, 446 U.S. 983 (1980); *In re Unishops, Inc.*, 553 F.2d 305, 308 (2d Cir. 1977).

[14] *In re Connecticut Celery Co.*, 106 L.R.R.M. 2847, 2851 (Bkrtcy., D. Conn. 1980) ("a debtor in possession who abrogates contractual obligations of a labor agreement without the permissions of a bankruptcy court does so at its peril.")

II. COLLECTIVE BARGAINING AGREEMENTS CAN NOT BE REJECTED ABSENT COMPLIANCE WITH THE DUTY TO BARGAIN

A. The Bargaining Obligation

A requirement that the debtor-in-possession bargain with the union over needed mid-term contract concessions before proceeding to the bankruptcy court to seek total rejection of the collective bargaining agreement would contribute to an "accommodation of the two [statutes] which will give the fullest possible effect to the central purposes of both." *Sinclair Ref. Co.* v. *Atkinson*, 370 U.S. 195, 216 (1962) (Brennan, J. dissenting). *See* Note, *The Labor-Bankruptcy Conflict*, *supra*, 80 Mich. L. Rev. at 148-152.[15]

Under this scheme, a debtor-in-possession in need of relief would have to notify the union of proposed contract modifications, afford an opportunity to negotiate about them, and bargain in good faith to impasse. A satisfactory compromise would hopefully be reached. If not, the debtor-in-possession would then be free to seek rejection. Or, if the union was unwilling to meet, rejection could be sought immediately. The bankruptcy court could then permit rejection if necessary to ensure the success of the reorganization. To permit rejection without a bargaining prerequisite, even under the stringent standard of *REA Express*, *supra*, 523 F.2d at 172, would absolve the debtor-in-possession of any Labor Act responsibilities. It would result not in accommodation, but in a total abrogation of the labor laws. A bargaining prerequisite, however, would preserve the collective bargaining machinery to the fullest extent possible. The debtor-in-possession

[15] At least one bankruptcy court has already recognized the uselessness of the "new entity" concept and accommodated both statutes as we suggest. *In re Price Chopper Supermarkets, Inc.*, 19 Bankr. Rptr. 462, 465-6 (S.D. Cal. 1982). It is clear that courts have power to implement a bargaining requirement, as the Code gives them discretion over contract rejections. 11 U.S.C. § 365(a).

would be forced to comply with certain NLRA duties; if rejection is ultimately allowed, the § 8(d) prohibition against unilateral mid-term contract termination would be compromised, but the §§ 8(a)(5) and (d) bargaining obligation will have been fulfilled.

B. The Utility of the Bargaining Obligation

The goal of the NLRA is that "free opportunity for negotiation with accredited representatives of employees" will "promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel." *NLRB* v. *Jones & Laughlin*, *supra*, 301 U.S. at 45 (1936). Certainly the realization of this goal furthers the aim of the reorganization proceeding. It then makes eminent sense to allow the process to work.

Concededly, economic relief from collective bargaining agreements may be desirable to businesses undergoing reorganization. In such cases, the union can provide financial concessions, realizing that the company's collapse is hardly in the best interest of its members.[16] Raw economic realities demand union willingness to renegotiate with a financially troubled employer, even at the expense of industry uniformity in wages and conditions. Thus, the Court need not fear that union intransigence will make the bargaining obligation a time-consuming, futile effort.[17]

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[16] For an illustration of debtor-in-possession-union cooperation, see *In re Allied Supermarkets*, *supra*, 6 Bankr. Rptr. at 970. *See also A Louder Union Voice in Settling Bankruptcies*, Business Week, December 8, 1980.

[17] Indeed, this Court has noted its awareness of "past instances where unions have aided employers in saving failing businesses by lending technical assistance, reducing wages and benefits or increasing production, and even loaning part of earned wages to forestall closures." *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 681 n.19 (1981). Similarly, "labor history is replete with

Certainly, where economies can be derived from concessions in matters within the union's control, the collective bargaining process is uniquely suited to the resolution of this predicament.[18] Moreover, the union may also be able to suggest cost-saving operating procedures that will minimize the impact on workers of needed reductions.

Successful bargaining over these matters, by this Union, as well as others, is widely reported today.[19] Even if the negotiations are not fruitful, by affording workers a voice in contract modification, a company engenders mutual understanding and assures employees that its problems are real. Such trust is invaluable if the parties are to devise constructive measures to ease the company's problems. A demonstrated regard for employees' interests through advance notice and frank discussion of needed contract concessions will maximize the chances of a peaceful reorganization process and lessen the strike threat that unilateral termination may

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instances where a union has cooperated actively with an employer to keep a company financially afloat and thus to prevent the closing of a facility and the loss of jobs." *Brockway Motor Trucks* v. *NLRB*, 582 F.2d 720, 736 (3d Cir. 1978).

[18] *See Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964), finding a mandatory duty to bargain over a decision to subcontract work performed by union employees because the reason for the decision to contract out—that "economies could be derived by reducing the work force, decreasing fringe benefits, and eliminating overtime payments"—all were matters within the union's control and "peculiarly suitable for resolution within the collective bargaining framework." *Id.* at 213-14.

[19] *E.g.*, *World Airways Wins Concessions by [Teamsters] Union*, Los Angeles Times, Nov. 10, 1982; *Teamsters Agree To Tentative Pact with Concessions*, New York Times, Jan. 16, 1982; *Concessionary Bargaining*, Business Week, June 14, 1982; *G & W Has Received Union Concessions; Plant Closings Averted*, Wall Street Journal, July 12, 1982; *The Payoff of Wage Moderation*, Business Week, January 18, 1982.

pose. Note, *The Labor-Bankruptcy Conflict*, *supra*, 80 Mich. L. Rev. at 152.

A bargaining requirement serves another beneficial purpose. It enables the parties to modify only the burdensome terms of the contract, leaving workers protected from the loss of unburdensome benefits. "Rejection, however, is an all or nothing proposition." Note, *Labor-Bankruptcy Conflict*, *supra*, 80 Mich. L. Rev. at 152. The company cannot seek, nor can the court order, that certain portions of the agreement be retained. While the company must renegotiate the contract after rejection, there is a risk that workers "may not only receive smaller pay checks, but may lose accrued seniority credit," vacation, and other valuable benefits. *Id.*

In contrast to a negotiated compromise, rejection of a labor contract leaves the union and its members remediless. While they retain the right to strike (*Truck Drivers Local 807* v. *Bohack*, *supra*, 541 F.2d at 318), such a strike may very well be self-defeating if the company is verging on collapse. The Union may also treat the rejection as a breach of the contract and become a general creditor for whatever damages are provable. Damages, however, will not compensate for the intangible benefits lost in the rejection, and will be satisfied only after the claims of preferred creditors.[20] Faced with this woeful alternative, unions will be apt to overcome their reluctance to engage in mid-term concession bargaining to avoid the drastic consequences of outright contract rejection.

Moreover, such negotiations can only benefit the company. If they succeed, the company will obtain relief and then be able to approach its creditors for further relief with specific predictions as to labor costs. Contract rejection, on the other hand, will remove this

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[20] *See, e.g.*, Note *Bankruptcy and the Rejection of Collective Bargaining Agreements*, 51 Notre Dame Law. 819, 830-31 (1976); Note, *Corporate Reorganization and the Right of Labor*, 53 Harv. L. Rev. 1360, 1363 (1940).

element of certainty and might precipitate a retaliatory strike which could easily spell the demise of the company. Thus, collective bargaining will minimize industrial strife, which is of crucial importance in the case of ailing businesses.

If negotiations fail, nothing in the Act forces an employer "to engage in fruitless marathon discussion." [21] *NLRB* v. *American National Insurance Co.*, 343 U.S. 395 (1952). When impasse is reached, rejection can be sought.

C. Section 1167 of the Code and the Railway Labor Act Machinery For Voluntary Adjustments of Labor Management Disputes

Section 1167 of the Code (11 U.S.C. § 1167) specifically exempts collective bargaining agreements subject to the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, from rejection under § 365. Congress chose instead to allow the elaborate § 6 Railway Labor Act (45 U.S.C. § 156) procedures for the modification and termination of contractual terms to substitute for the rejection procedure. "The subject of railway labor is too delicate and has too long a history for this Code to upset established relationships . . . [§ 1167] continues this balance unchanged." H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 423 (1977).

Contrary to the federal appellate courts which have considered § 1167, including the court below,[22] the ab-

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[21] The system of collective bargaining is flexible enough to adapt to the exigencies of the business situation. If the economic circumstances are truly drastic, and the union can offer no sufficient concession, then an impasse in the negotiations that would permit the employers to seek rejection will be reached far sooner than where there is ample time for negotiations, or where the union is in a position to alleviate conditions and is advancing meaningful alternatives.

[22] *Matter of Brada Miller Freight System, supra*, 702 F.2d at 897; *Bildisco, supra*, 682 F.2d at 78. *See also, REA Express, supra*,

sence of a Code provision, comparable to § 1167, governing NLRA contracts, does not mean that such contracts are subject to § 365 without regard to NLRA § 8(d) requirements. Indeed, when the forerunner of Code § 1167 was enacted in 1933 (§ 77(n), 11 U.S.C. 205(n) (repealed)), the NLRA had not yet been passed. But the provision "indicate[d] an intent to specially treat the collective bargaining agreements existing in federal labor legislation." Note, *Bankruptcy and the Rejection of Collective Bargaining Agreements*, *supra*, 51 Notre Dame Law. at 826. Then, when the NLRA was enacted in 1936, it contained no termination or modification provisions, simply § 8(5), making it an unfair labor practice for employers to refuse to bargain; § 8(d) was not added to the Act until the 1947 Taft-Hartley Amendments.

Thus, our proposed accommodation of the two statutes conforms with the original statutory interplay. Congressional silence as to the accommodation after § 8(d) was enacted, likely a matter of legislative oversight, does not detract from our argument. Thus, we do not urge in this case that NLRA contracts are totally exempt from § 365, or that § 8(d) termination restrictions *in toto* should substitute, as do § 6 RLA procedures, for the rejection process. Rather, we suggest that § 8(a)(5) and (d) bargaining requirements be a prior condition to § 365 rejection. Ideally, the negotiations will be fruitful and will, in fact, substitute for § 365, but rejection would be available as a last resort should voluntary adjustment fail.

The flexibility of NLRA bargaining requirements (*supra*, note 21) makes them easily reconcilable with the reorganization proceeding. No special Code provision,

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523 F.2d at 169, and *Kevin Steel*, *supra*, 519 F.2d at 704, dealing with § 77(n) the forerunner to § 1167 ("Congress knew how to remove labor agreements from the scope of a general power to reject executory contracts.")

comparable to § 1167, is necessary to achieve this accommodation; it is self-actualizing. By contrast, the Railway Labor Act prescribes a machinery which is "more complex than that of any other industry." *IAM* v. *Street*, 367 U.S. 740, 755 (1961). The procedures, involving direct conference, mediation, and voluntary binding arbitration, "are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute," and avoids strikes. *Railway Clerks* v. *Florida E. Coast Ry.*, 384 U.S. 238, 246 (1966).

This "interminable process" (*Detroit & Toledo Shore Line R.R.* v. *UTU*, 396 U.S. 142, 149 (1969)), is to a large extent within the control of the National Mediation Board, which is empowered with vast discretion in mediating the dispute. The Board can continue mediation as long as it deems warranted. It will decide whether further mediation is likely to yield an agreement, or whether the parties should be released from mediation to resort to self-help.[23] In the case of an ailing carrier, the National Mediation Board will make these determinations based on the carrier's financial condition, and an analysis of its ability to survive without immediate contract concessions. The likelihood of labor strife caused by unilateral action, and its impact on the carrier, are also factors considered by the Board in determining whether to prolong the status quo or release the parties to their self-help remedies.

No comparable governmental control is exerted over NLRA contract modifications or terminations. The par-

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[23] Thus a party desiring to end mediation under the RLA must come forward with objective facts showing that the NMB is continuing "mediation on a basis that is completely and patently arbitrary . . . notwithstanding the lack of any genuine hope or expectation that the parties will arrive at an agreement." *IAM* v. *NMB*, 425 F.2d 527, 537 (D.C. Cir. 1970). "[N]o party has been able to meet the burden and win a judicially ordered end to mediation." *Seaboard World Airways, Inc.* v. *Teamsters Local 851*, 501 F. Supp. 47, 50 (E.D. N.Y. 1980).

ties control the process themselves, subject to the NLRB's unfair labor practice authority. But, in both systems there is a paramount concern with strike avoidance. *See NLRB* v. *Jones & Laughlin*, *supra*, 301 U.S. at 42. This concern is particularly crucial for ailing businesses. Thus, the collective bargaining process should be permitted to work, just as much as the § 6 procedures.

Nothing is lost by this for the parties can quickly bring a dispute to impasse if nothing is to be gained from prolonging negotiations. This distinguishes the process from the intricate and prolonged RLA procedures. Thus, lacking the flexibility of the NLRA system, the § 6, RLA mechanism could not be self-imposed upon the rejection process. Accordingly, § 1167 provides for the RLA provisions to take precedence. But the existence of § 1167, and Congressional silence in the Code as to NLRA contracts, can not be interpreted to eviscerate entirely the NLRA obligations.

III. JUDICIAL RESTRAINT IN LABOR MANAGEMENT DISPUTES IS REQUIRED EVEN UNDER THE EXERCISE OF BANKRUPTCY POWER

A. Judicial Restraint and the Bankruptcy Power

In rejecting a collective bargaining agreement a bankruptcy court clearly interferes in the collective bargaining process and upsets the balance of bargaining power achieved by the free play of economic forces. This destroys the very underpinning of our national labor policy. Unwarranted judicial interference in labor disputes historically was a major cause of social unrest in this country and was one of the prime factors behind the passage of the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, and also the NLRA.[24]

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[24] Frankfurter & Greene, *The Labor Injunction* 206 (1930) "That the exercise of their powers in labor controversies has harmfully implicated the federal courts cannot be gainsaid. . . . [P]ower-

The Norris-LaGuardia Act was passed in 1932 to deprive federal courts of jurisdiction to issue injunctions "in a case involving or growing out of a labor dispute," except in unusual or defined circumstances. One of the restrictions of this Act, § 8, denies injunctive relief to any party who has not attempted to settle the labor dispute by negotiation or resort to available governmental machinery for mediation or voluntary arbitration (29 U.S.C. § 108). Thus, it made "injunction a last line of defense, available not only after other legally required methods, but after all reasonable methods as well, have been tried and found wanting. This purpose runs throughout the Act's provisions. It is dominant and explicit in § 8." *Bro. of Railroad Trainmen* v. *Toledo, Peoria & Western Railroad*, 321 U.S. 50, 58-59 (1944).

The underlying theoretical basis of the Norris-LaGuardia Act was that preventing judicial interference in labor disputes would promote employer recognition of unions and further nonjudicial practices of collective bargaining for the resolution of labor disputes. Through freedom of association and collective bargaining, organized labor would grow in strength. Through this growth, labor would achieve a comparable bargaining power with capital. *See* § 2 Norris-LaGuardia (statement of policy) (29 U.S.C. § 102).

While Norris-LaGuardia provided a shield against judicial interference, it did little to promote the growth of organized labor and the development of collective bargaining in industry. This state of affairs, coupled with grim economic realities, led Senator Robert Wagner to introduce "one of the most drastic legislative innovations of the decade. It threw the weight of government behind the right of labor to bargain collectively, and compelled employers to accede peacefully to the

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ful opinion . . . asks whether the federal courts must continue . . . 'to take up the shock of our industrial welfare.'"

unionization of their plants." [25] Of central importance, it made these rights legally enforceable by creating an independent agency to conduct representation elections and to restrain business from committing "unfair labor practices."

The 1935 Wagner Act was intended to accomplish the same goals as the Norris-LaGuardia Act. By empowering workers to act collectively they would achieve the means to "deal on an equality with their employer." *NLRB* v. *Jones & Laughlin, supra*, 301 U.S. at 33. The redress of this "discrepancy in economic power between labor and management" (*Matter of Brada Miller Freight, supra*, 702 F.2d at 902) would, in turn, minimize labor strife. *Jones & Laughlin, supra*, 301 U.S. at 42. See also § 1 NLRA (Declaration of Policy) (29 U.S.C. § 151).

Congress thus entrusted the fate of labor and capital to the free play of economic forces, removing the federal judiciary from the arena.[26] Judicial intrusion was warranted strictly as a "last line of defense, available only after" the collective bargaining process had "been tried and found wanting," and then only in unusual and extreme circumstances. *Bro. of Railroad Trainmen* v. *Toledo, Peoria & Western Railroad, supra*, 321 U.S. at 59.

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[25] William E. Leuchtenberg, *Franklin Roosevelt and The New Deal* 151 (1963).

[26] This Court has repeatedly admonished the federal courts, the states, and the NLRB, not "to upset the balance of power between labor and management expressed in our national labor policy." *Teamsters Union Local 20* v. *Morton*, 377 U.S. 252, 260 (1964). "Congress meant to leave some activities unregulated and to be controlled by the free play of economic forces." *Local 76, Int'l Ass'n of Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132, 144 (1976). This free play of economic forces "is part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer, and the community." *Teamsters Union Local 20* v. *Morton, supra*, 377 U.S. at 259.

Like the labor laws, the bankruptcy reorganization provisions were Depression era enactments. "Before the [June 7, 1934] enactment of § 77B. . . the bankruptcy mechanism was designed for the final liquidation" of the company. *SEC* v. *United States Realty & Improvement Co.*, 310 U.S. 434, 448 (1940).[27] Rather than doom countless businesses to utter destruction, the reorganization provisions were designed to afford a rescue.[28]

There is no evidence that these bankruptcy provisions were intended to supersede the concurrently enacted labor laws. Indeed, *all* indicia show that labor policy, formulated at a time of record bankruptcies, would govern in matters involving companies in reorganization. Thus, for example, the NLRA specifically covered trustees in bankruptcy in § 2(1) and (2) (29 U.S.C. § 152(1) and (2)).

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[27] In 1934, § 77B was added to the Bankruptcy Act (48 Stat. 911), providing for corporate reorganization. This was replaced by Chapter X (Corporate Reorganization) of the 1938 Chandler Act Amendments. 6 *Collier on Bankruptcy*, ¶¶ 0.01, 0.12 (14th ed. 1978). This chapter, plus Chapters XI (Arrangements) and XII (Real Property Arrangements), also added in 1938, are now consolidated into Chapter 11 of the Code.

[28] These provisions were "designed not only to aid in solving the difficulties into which many corporations had been precipitated but also to correct the defects and vices of the previous federal equity receivership procedure and to supplant it as a means of effecting reorganization." 6 *Collier on Bankruptcy*, ¶ 0.05 at 61-63 (14th ed. 1978). Coincidentally, the abuses and vices of the equity receivership procedure also, at least in part, compelled the enactment of the Norris-LaGuardia Act. Compare, *Duparquet, Huot & Moneuse Co.* v. *Evans*, 297 U.S. 216, 218-19 (1936) ("The evils and embarrassments that brought § 77B into existence are matters of common knowledge. . . . At times the receivership was used as an instrument of fraud or covin"), with *United States* v. *United Mine Workers*, 330 U.S. 258, 320 (1947) (concurring opinion) (concerning the Norris-LaGuardia Act: "No series of cases contributed more to the feeling that the federal courts abused their equity jurisdiction than those involving employees of railroads in equity receivership.")

Also, § 77B(l) and (m) of the Bankruptcy Act guaranteed employees of companies in reorganization freedom from interference in their organizational rights, and prohibited "yellow-dog" contracts (i.e., agreements conditioning employment on non-membership in labor organizations or membership in a company union). Correspondingly, NLRA § 14 (now § 15, 29 U.S.C. § 165) specifically provided that in cases of conflict with Bankruptcy § 77B(l) and (m), the NLRA would prevail.[29] *See, NLRB* v. *Baldwin Locomotive Works, supra*, 128 F.2d at 44.

Similarly, § 14 of the Norris-LaGuardia Act (29 U.S.C. § 114) provided that all laws in conflict with it were repealed, and numerous courts have found that Act's provisions controlling in bankruptcy contexts.[30] As the Tenth Circuit Court of Appeals said in an early case, the reorganization provisions were "not intended and may not be used as an avenue of escape by a company from the provisions of the Norris-LaGuardia Act in a labor dispute with its employees. . . . There is nothing in the Norris-LaGuardia Act which exempts equity receiverships of any kind from its provisions." *Int'l. Bro. of Teamsters* v. *Quick Charge, Inc.*, 168 F.2d 513, 516 (10th Cir. 1948).[31]

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[29] When § 77B(l) and (m) became § 272 (29 U.S.C. § 672) (repealed) with the Chandler Act, NLRA § 14 was changed accordingly. While § 272 is now repealed, § 14 remains in the NLRA, now as § 15.

[30] *Truck Drivers Local Union No. 807* v. *Bohack Corp., supra*, 541 F.2d at 318 (Norris-LaGuardia Act, and in particular § 8, controlling in reorganization proceedings: "The argument is made that to allow picketing in the case of this financially troubled debtor is to put it out of business. . . . But the policy of our labor laws is simply to provide rules for the handling of labor disputes, not to prohibit the use of economic power in the resolution of such disputes.")

[31] *Accord In Re Third Avenue Transit Corp.*, 192 F.2d 971, 973 (2d Cir. 1951) ("The well established power of the reorganization court to issue orders necessary to conserve the property in its cus-

Thus, there is no evidence, and it is inconceivable, that in enacting the bankruptcy laws, Congress silently authorized the federal judiciary to take sides in labor controversies or enabled management to exploit bankruptcy courts' equity powers to fight labor.

B. Rejection as a Last Line of Defense

Yet, when a court approves rejection of a collective bargaining agreement, it enters the labor dispute and tips the balance of power in favor of the employer. While the employer is obligated to attempt to renegotiate the agreement after rejection, the union's bargaining power will have been greatly diminished by the rejection. Concessions will be forced on labor alone. The ensuing negotiations will be little more than a rubber stamp of the changes which the court has already ruled necessary to avoid collapse of the business. In other words, the new contract will be one dictated by the court rather than one collectively bargained by the parties.[32]

Management will be able to achieve a better price for labor, not by its bargaining strength—or the free play of economic power—but by judicial interference. With union bargaining power weak at this point, management will have little incentive to restore intangible, nonburdensome protections to the contract. In this fashion, workers will lose what they have won through the free play of their collective bargaining strength. The bankruptcy court will

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tody must be exercised within the scope of a jurisdiction which is limited by the broad and explicit language of the Norris-LaGuardia Act."); *Petrusch* v. *Teamsters Local 317*, 667 F.2d 297, 300 (2d Cir. 1981) (Automatic stay provisions of Code do not supersede Norris-LaGuardia Act even though the latter is not mentioned in the Code. "Such omissions are to us self-evident proof that Congress never intended to supersede or transcend it, since we cannot believe the Norris-LaGuardia Act was to be superseded, *sub silentio*.")

[32] Section 8(d) prohibits the NLRB and the courts from dictating contract provisions, *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970).

usurp the collective bargaining process and take away from workers what is given them by national labor policy. While employer-debtors may seek to enlist the federal judiciary in taming the labor movement, the courts should be loathe to participate in an affair so at odds with national policy and justice.

Properly viewed in this fashion, rejection of collective bargaining agreements should not be permitted by the bankruptcy court if the debtor-in-possession has "failed to make every reasonable effort to settle [the] dispute . . . by negotiation." This § 8 Norris-LaGuardia Act requirement is equivalent to the NLRA §§ 8(a)(5) and (d) duty to bargain in good faith, and furnishes additional grounds for making bargaining a prerequisite to rejection.[33] As intended by Congress, imposition of this § 8 requirement will safeguard against unwarranted judicial intrusion in labor controversies.

IV. REJECTION OF COLLECTIVE BARGAINING AGREEMENTS IS NOT WARRANTED UNLESS THE DEBTOR-IN-POSSESSION CAN SHOW THAT ABSENT REJECTION THE BUSINESS WILL FAIL

Should negotiations fail, rejection of labor contracts "should be authorized only where it clearly appears to be the lesser of two evils and that, unless the agreement is rejected, the carrier will collapse and the employees will

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[33] This accommodation conforms with the interplay of these statutes when enacted. While § 77B was enacted before the NLRA, the Norris-LaGuardia Act was then in effect. By 1938, when the Chandler Act amendments were added, the Wagner Act had been passed containing § 8(5), making it an unfair labor practice for employers to refuse to bargain collectively. (§ 8(5) was the forerunner to § 8(a)(5); § 8(d) was not enacted until 1947 with the Taft-Hartley Amendments). Thus, what co-existed in 1938 when the reorganization procedures were crystallized in the Bankruptcy Act, were the right to reject executory contracts contained in Chapters X and XI, the Norris-LaGuardia Act, including § 8, and § 8(5) of the Wagner Act.

no longer have their jobs." *REA Express, supra*, 523 F.2d at 172.

As discussed, rejection is an "all or nothing" proposition (*supra*, p. 15). With the termination of the contract, workers lose not only strictly monetary items, but intangible benefits such as seniority and pension rights, health and welfare coverage, grievance arbitration procedures, and protections against unjust discharge. The Union also loses certain protections of its status, such as union security provisions, which have no bearing on the company's financial condition. These intangible benefits " 'are incapable of forming the basis of a provable claim for money damages. That would leave the employees without compensation for their losses, at the same time enabling the debtor, at the expense of the employees, to consummate what may be a more favorable plan of arrangement with its other creditors.' " *Kevin Steel, supra*, 519 F.2d at 707, quoting *In re Overseas National Airways*, 238 F. Supp. 359, 361-62 (E.D. N.Y. 1965).

In light of the drastic consequences of rejection, virtually all courts have agreed that the principles of law governing rejection of ordinary commercial contracts are wholly inapplicable to collective bargaining agreements.[34] Thus, while commercial contracts may be rejected simply "upon a showing that rejection would benefit the estate . . . this minimal burden is insufficient to protect the special rights accruing to employees under the federal labor laws." *Matter of Brada Miller Freight, supra*, 702 F.2d at 899.

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[34] The Second Circuit has so stated in *Kevin Steel, supra*, 519 F.2d at 707, and *REA Express, supra*, 523 F.2d at 172; as has the Eleventh in *Matter of Brada Miller Freight, supra*, 702 F.2d at 899, and the court below, *Bildisco, supra*, 682 F.2d at 79. The Ninth Circuit in *Local Joint Executive Board* v. *Hotel Circle, supra*, 613 F.2d at 213 n.2, expressly declined to decide what standard was appropriate for rejection.

Moreover, before the Third Circuit's decision in this case, most courts, relying on the *REA Express* standard, permitted labor contract rejection only if essential to the business' survival.[35] But in the Third Circuit's view, the unique rights of workers would be adequately protected merely by balancing the equities.[36] *Accord, Matter of Brada Miller Freight, supra*, 702 F.2d at 900. This vague and subjective standard, however, has serious shortcomings. In the first place, it lacks objective criteria. Thus, the court's inquiry may easily slip into the mere "business judgment" rule of ordinary commercial contracts. This may result from the bankruptcy courts' inexperience in labor matters or from bias.[37]

Indeed, while the Third Circuit purported to balance the equities, its articulations parrot the "business judg-

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[35] *Cf. Matter of Brada Miller Freight, supra*, 702 F.2d at 900 and cases cited at n.25.

[36] The Third Circuit relied on the holding in *Kevin Steel, supra*, 519 F.2d at 707, that rejection is proper "only after thorough scrutiny, and a careful balancing of the equities." In its view *Kevin Steel* and *REA Express* enunciated two different rules, and the latter was too stringent. A better way to view the discrepancy in language between these two Second Circuit decisions, however, is that *REA Express*, decided just a few weeks after *Kevin Steel*, "is merely a fuller articulation of the somewhat loosely-worded standard of *Kevin Steel*." (*Matter of Brada Miller Freight, supra*, 702 F.2d at 900.) Until *Bildisco*, most courts did just that.

[37] Since the function of the bankruptcy court is solely to oversee the bankruptcy laws, "it can be argued that the court may be unduly sympathetic to the 'equities' favoring the debtor-in-possession." Note, *Bankruptcy and the Rejection of Collective Bargaining Agreements, supra*, 51 Notre Dame Law. at 832. Also, the legislative history of the Bankruptcy Code discusses the "unusually close relationship between the bankruptcy judges and the bankruptcy bar, especially the debtors' and trustees' bar." This had led to a feeling "that there is a 'bankruptcy ring' that has an inside track on all bankruptcy matters, including the judges' favoritism." H.R. Rep. No. 595, 95th Cong., 2d Sess. 95. That Report also discussed the "isolation of the bankruptcy bench and bar from the mainstream of American jurisprudence." *Id.* at 96.

ment" test. In its view, the weighing of equities rule properly treats "the interests served by the Labor Act" as roughly equal to "those of the debtor's other creditors." 682 F.2d at 81. The debtor first must show that the contract is burdensome. In balancing the equities, "the polestar is to do equity between claims which arise under the labor contract and other claims against the debtor." The bankruptcy court must consider the "possible "sacrifices which other creditors are making,' " and whether rejection will "assist" a reorganization. *Id.*

This language sacrifices the superior interests which employees have over other parties affected by a bankruptcy. *See, Matter of Brada Miller Freight, supra,* 702 F.2d at 899. It disregards the hard fact that the irreparable destruction of workers' benefits is far more radical than the relatively simple renegotiation of rights undertaken by all creditors in a reorganization proceeding. Commercial creditors can spread the risk of one transaction failing. But workers do not have this capability; they have invested solely in, and are totally dependent on, one employer for their economic livelihood and quality of work-life.

Treating workers on a parity with other creditors also ignores this Court's repeated judgment that "a collective bargaining agreement is not an ordinary contract. . . . Central to [its] peculiar status and function . . . [is] that it is not in any real sense the simple product of a consensual relationship." *John Wiley & Sons* v. *Livingston, supra,* 376 U.S. at 550, quoting *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-79 (1960).[38]

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[38] Prior to the 1947 Taft-Hartley amendments to the NLRA, the collective bargaining agreement was not even perceived by the legal community as a "contract" at all. Chamberlain, *Collective Bargaining and the Concept of Contract,* 48 Col. L. Rev. 829, 832 (1948). Accordingly, commentators writing contemporaneously with the 1938 Bankruptcy Act amendments opined that it would be a "rare case" where rejection of such agreements would be

Certainly, any financial obligation is burdensome to a failing business, and "given a choice, [any debtor] would rather pay lower non-union labor costs." *In re Connecticut Celery Co., supra*, 106 L.R.R.M. at 2852. But rejection should be the rare case, for it enables "an employer [to] accomplish under the Bankruptcy Act what it could not accomplish by any other means, i.e., the unilateral termination of a labor agreement during its term." LaPenna, *Bankruptcy and the Collective Bargaining Agreement*, 29 N.Y.U. Lab. Conf. 169, 176 (1979). "[T]he potentialities of this device are considerable," and suggest "the possibility that [bankruptcy proceedings] may be used as a solvent for labor difficulties." Note, *Corporate Reorganization and the Rights of Labor, supra*, 53 Harv. L. Rev. at 1360. *See, e.g., In re Figure Flattery, Inc.*, 88 Lab. Cas. (CCH) ¶ 11.850 (S.D.N.Y. 1980).

While employers once may have been reluctant, because of the fear of retaliatory action, to use bankruptcy as a ploy to rid themselves of unions (*see, Kevin Steel, supra*, 519 F.2d at 705-06), in the current economic depression and social climate increasingly hostile to organized labor, that possibility is no longer unthinkable. With the recent dramatic rise in the number of bankruptcies filed, there has been an alarming increase in the use of Chapter 11 to reject collective agreements.[39] Indeed, the Third Circuit's fear that the stringent *REA Express* test erects "impossible barriers to rejection" (682 F.2d at 79) is refuted by the reported cases.

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allowed. 6 *Collier on Bankruptcy*, ¶ 3.23 at 576 (14th ed. 1978). "The suggestion that labor should assume business risks and suffer its rights to be adjudicated in bankruptcy seems to overlook the fact that a labor agreement is not a business transaction . . . but more closely resembles an armed truce . . . . Note, *Corporate Reorganization and the Rights of Labor, supra*, 53 Harv. L. Rev. at 1363-64.

[39] *See Firms Using Bankruptcy To Fight Labor*, Wall Street Journal, March 30, 1983.

To prevent the rejection avenue from being abused for anti-union or non-economic purposes, it should be available only if labor costs are the obstacle to recovery. If the test is less stringent, an employer will be able to exploit this legal mechanism to rid itself of unwanted labor contracts.[40] It will also discourage the employer from seeking to negotiate concessions with the union. For if rejection of the entire contract is possible, that may be more appealing than solely economic relief. Once the contract is rejected, ridding itself entirely of the union may be easy to achieve. Thus, only if jobs are truly at stake is rejection warranted.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

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Dated: May 6, 1983

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[40] Thus, *In re Southern Electronics*, 23 Bankr. Rptr. 348 (E.D. Tenn. 1982), appeal docketed No. 83-5059 (6th Cir.), cited *Bildisco* in allowing the debtor to reject because of seniority provisions it wanted to eliminate.

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and

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v.

NATIONAL LABOR RELATIONS BOARD and BILDISCO and BILDISCO, DEBTOR-IN-POSSESSION, *Respondents*.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF UNITED MINE WORKERS OF AMERICA, INTERNATIONAL UNION *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF OF UNITED MINE WORKERS OF AMERICA, INTERNATIONAL UNION *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The United Mine Workers of America, International Union ("UMWA" or "Union") hereby moves this Court for leave to file a brief amicus curiae in support of petitioners. Counsel for petitioners have consented to the filing of this brief. Counsel for respondent Bildisco has not consented, indicating his belief that if he gave the UMWA his

consent to file a brief, he would have to do so for other organizations who have made similar requests. Respondents' counsel stated that he had no other reason for opposing the UMWA's request.

The interest of the amicus curiae, the UMWA, is set forth in detail in its brief. To summarize, the UMWA is an industrial union which represents approximately 240,000 coal miners throughout the United States and Canada for the purposes of collective bargaining and contract administration. The UMWA is currently signatory to approximately 2,300 collective bargaining agreements with employers involved in every aspect of the coal industry. In the United States these contracts are in effect in twenty-five states.

The failure of the Third Circuit in the case of *In re Bildisco* to follow the Second Circuit's established test that rejection of a collective bargaining agreement should only be permitted upon a showing that the business is likely to fail unless the agreement is rejected has a detrimental effect on the right of the UMWA's members to enjoy the benefits of their collective bargaining agreements. It also has a detrimental effect on the members' right to the statutory procedures for modification and rejection of collective bargaining agreements as guaranteed to them under the National Labor Relations Act.

The UMWA also seeks to participate as an amicus in order that the Court may have the benefit of its views that collective bargaining agreements are not executory contracts subject to rejection under 11 U.S.C. 365(a) of the Bankruptcy Act. The UMWA submits that a collective bargaining agreement, in many of its particulars, sets forth unilateral obligations and does not contemplate mutuality of performance as is required by an executory contract.

For the foregoing reasons the UMWA requests that its Motion to File an Amicus Brief be granted.

Respectfully submitted,

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BRIEF OF UNITED MINE WORKERS OF AMERICA, INTERNATIONAL UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The United Mine Workers of America ("UMWA") is an industrial union which represents approximately 240,000 coal miners throughout the United States and Canada for the purposes of collective bargaining and contract administration. The UMWA is currently signatory to approxi-

mately 2,300 collective bargaining agreements with employers in every aspect of the coal industry. In the United States these contracts are in effect in twenty-five states.

The failure of the Third Circuit in the case of *In re Bildisco* to follow the Second Circuit's established test that rejection of a collective bargaining agreement should only be permitted upon a showing that the business is likely to fail unless the agreement is rejected, has a detrimental effect on the right of the UMWA's members to enjoy the benefits of their collective bargaining agreements. It also has a detrimental effect on the members' right to the statutory procedures for modification and rejection of collective bargaining agreements as guaranteed to them under the National Labor Relations Act ("NLRA").

The increase in bankruptcy filings in the coal industry makes it apparent that this decision may have a substantial impact on coal miners.[1] Of late, the UMWA has become an interested party in several reorganization proceedings under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101 et seq., where the debtor has attempted to reject its collective bargaining agreement. The Union is fearful that if the *Bildisco* decision is adopted by this Court, coal operators' bankruptcy filings may increase

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[1] In this regard, "Coal Week," a coal industry publication, in a recent article devoted to coal company bankruptcies, quotes sources as stating that in Indiana, "[c]oal company bankruptcies have nearly tripled in the last two years" and in "Virginia coal-related bankruptcies increased sharply from one in 1979 to 25 in 1980 and 28 in 1981." "Coal Week," February 28, 1983 at 3. The article also stated that presently many coal companies rather than filing for bankruptcy "hang on the verge because their banks believe keeping the companies in business is a lesser evil."

even more as it becomes easier for coal operators to reject their collective bargaining agreements with the UMWA.[2]

As is widely known by those familiar with collective bargaining in the coal industry, it has never been easy for the UMWA to obtain collective bargaining agreements with coal operators. Agreements are negotiated only after many failures, and a great deal of time, concessions, expense, and economic and physical sacrifice by the membership.

Once, however, a contract is obtained, the Union believes the membership is entitled to have that contract honored unless the Union through collective bargaining agrees to modify the contract or the employer can show that otherwise he will go out of business. To permit a bankruptcy court to do what it appeared to do in *Bildisco* and reject a hard-won collective bargaining contract because a company can demonstrate what is already apparent, that it is cheaper to operate non-union than Union, will severely damage the confidence of the coal miners in the collective bargaining process and in their right to the protection of the national labor laws.

The UMWA also seeks to participate as an amicus in order that the Court may have the benefit of its views that collective bargaining agreements are not executory contracts subject to rejection under 11 U.S.C. 365(a) of the Bankruptcy Act. The UMWA submits that a collective bargaining agreement, in many of its particulars, sets forth unilateral obligations and does not contemplate

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[2] In fact a recent article on the *Bildisco* decision in a widely read employers' newspaper contributes to these fears. The article, prominently displayed on the front page of the second section, began with the headline "FIRMS USING BANKRUPTCY TO FIGHT LABOR." *Wall St. Journal*, March 30, 1983, at 29, col. 3.

mutuality of performance as is required by an executory contract. The Union recognizes that this view is not widely shared.

SUMMARY OF ARGUMENT

A collective bargaining agreement is not an executory or ordinary contract and may not be rejected without a showing that the employer has bargained with the union and will be forced to cease operations altogether if rejection is not permitted.

A collective bargaining agreement binds an employer in a reorganization proceeding to its terms and conditions and any changes in its terms must be sought within Section 8(d) of the National Labor Relations Act. Should, however, this Court permit rejection of a collective bargaining agreement by a bankruptcy court, such a rejection should only be allowed to occur where it is necessary to ensure survival of the business. If a debtor company can continue to operate without requiring workers to sacrifice accrued benefits and due process in the work place, then the employer should be required to do so.

ARGUMENT

I. A COLLECTIVE BARGAINING AGREEMENT IS NOT AN EXECUTORY CONTRACT SUBJECT TO REJECTION BY A BANKRUPTCY COURT.

The UMWA submits that the court in *Bildisco* did not recognize the significant differences between collective bargaining agreements and mere executory contracts. As a result, it created a standard for rejection of collective bargaining agreements which threatens industrial peace

and will shake the confidence of employees in the process of collective bargaining.[3]

First, as is well recognized, a collective bargaining agreement is not an ordinary contract. See, e.g., *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1963). Moreover, as this Court stated in *Warrior & Gulf Navigation*, 363 U.S. 574, 578-579 (1960), a collective bargaining agreement "is more than a contract, it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . A collective bargaining agreement is an effort to erect a system of industrial self-government."

Given this, it is respectfully urged that a collective bargaining agreement is not a mere executory contract. While Petitioners appear to concede this question, and lower courts in the country have concluded that collective bargaining agreements constitute executory contracts within the meaning of the Bankruptcy Code, the question is not as simple as it may first appear. The Bankruptcy Code does not define executory contracts. The most widely accepted definition is presented by Countryman in his exhaustive articles, "Executory Contracts in Bankruptcy," 57 Minn. L. Rev. 439 (Part I) (1973) and 58 Minn. L. Rev. 479 (Part II) (1974). He states that an executory contract is "a contract under which the obligations of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other." 57 Minn. L. Rev. at p. 460.

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[3] Section 365(a) of the Bankruptcy Act allows the trustee, in a bankruptcy proceeding, subject to the bankruptcy court's approval, to "assume or reject any executory contract or unexpired lease of the debtor."

This concept of mutuality in executory contracts does not include those unilateral duties which make up so much of a collective bargaining agreement. For example, the National Bituminous Coal Wage Agreement of 1981, the labor contract currently in effect between the UMWA and the multi-employer bargaining group, the Bituminous Coal Operators' Association, Inc., requires the employer to provide health benefits to pensioners as long as the employer is in business and to pay health benefits to laid-off employees according to an established timetable. In these cases, the pensioners and laid-off employees have fully performed their obligations and they rely on future performance by the employer. This is the situation Countryman addressed with the following analysis:

> When the employee has not been fully compensated for all the services he has rendered, he retains a claim against the employer for those services. The contract upon which the employee's claim is based is unilateral because only the employer has made a promise, and such a contract is not executory as that term has been defined under the Act because no further performance is owing from the employee. 58 Minn. L. Rev. at 480 (Citations omitted)

This reasoning was adopted by the court in *In re Louisville Motor Exchange, Inc.*, 26 Bankr. 490 (Bankr. W.D. K.y. 1983) and *In re J. M. Fields, Inc.*, 22 Bankr. 861 (Bankr. S.D. N.Y., 1982). See also *Northwest Airlines, Inc.* v. *Klinger (In re Knutson)*, 563 F.2d 916 (8th Cir. 1977); *Jenson* v. *Continental Financial Corporation*, 591 F.2d 477 (8th Cir. 1979) and *In re Smith Jones, Inc.*, 26 Bankr. 289 (Bankr. D. Minn. 1982).

Similarly, seniority rights involve situations in which the employees have fully performed and in turn rely on the employer's unilateral performance. In addition, grievance and arbitration of disputes, disciplinary proce-

dures and no strike/no lock out agreements are not executory.

The courts and commentators, and the Third Circuit, in particular, have made much of the exemption granted collective bargaining agreements subject to the Railway Labor Act ("RLA"), see 11 U.S.C. § 1167, in support of their contention that all labor agreements except those under the RLA are executory. Argument by negative implication is inherently risky, and the Union submits that the Court below erred in its conclusion that the RLA exemption proves that all other collective bargaining agreements are not to be excluded.[4] In fact, the RLA exemption merely shows congressional awareness of the particular importance of the railroads to the economic strength and security of the nation in 1934. The UMWA thinks the better conclusion is that drawn by the commentors in "The Bankruptcy Law's Effect on Collective Bargaining Agreements," 81 Colum. L.Rev. 391, 396 (1981):

> Congress had evidently never considered this situation; it had overlooked the problem of business in reorganization when it passed the NLRA, and collective bargaining agreements were in their infancy when Congress had last overhauled the bankruptcy laws. 81 Colum. L. Rev. 396 (Footnote omitted) See also n. 57 at 397.

In short, collective bargaining agreements are neither ordinary contracts nor mere executory contracts. A collective bargaining agreement, in many of its particulars, sets forth unilateral obligations and does not contemplate mutuality of performance.

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[4] In this regard see the analysis on this point put forth in Petitioner Local Union No. 408, IBT's Brief for Certiorari at 17-18, which the UMWA hereby adopts.

II. EVEN ASSUMING A COLLECTIVE BARGAINING AGREEMENT IS AN EXECUTORY CONTRACT SUBJECT TO TERMINATION BY A BANKRUPTCY COURT, SUCH A CONTRACT, FREELY ENTERED INTO BY AN EMPLOYER AND A UNION SHOULD NOT BE PERMITTED TO BE REJECTED UNTIL THE DEBTOR-IN-POSSESSION HAS MET AND BARGAINED WITH THE UNION AND FACES A CESSATION OF OPERATIONS WITHOUT TERMINATION.

A. A Debtor-In-Possession Employer Should Be Considered The Same Entity As A Pre-Bankruptcy Employer As To Its Respective Obligations Under the Collective Bargaining Agreement And Negotiating The Termination Of Such Agreements Under The Labor Laws.

Under the Third Circuit reasoning, an employer in a reorganization bankruptcy becomes a new entity and is no longer a party to its collective bargaining agreement even though ownership, management and day-to-day operations in many instances continue as before. The Third Circuit result is that on the day an employer files a reorganization bankruptcy proceeding, none of the employees are covered by existing collective bargaining agreements and the employer is free to make unilateral changes in terms and conditions of employment without regard to the NLRA and without interference by the National Labor Relations Board. The employees become, in effect, employees at will with no remedies for unfair practices. The employer is provided the opportunity to perform economic capital punishment on its employees and to discharge them without liability.

Such a result makes a mockery of the protections guaranteed to employees under the NLRA[5] and increases

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[5] Section 8(d) of the NLRA establishes that an existing collective bargaining agreement may not be modified or terminated during its

the potential for industrial strife, as employees realize that overnight they have lost contractual and statutory protections. If the *Bildisco* analysis is given effect, employees of an employer in a Chapter XI proceeding may have few alternatives to withholding their labor until a new collective bargaining agreement is reached because they will have no job security, no assurances of wage rates, seniority, pension and health benefit coverage, or any other term or condition of employment.

The Third Circuit effectively eliminates the NLRA remedy provided by Congress. The UMWA urges this Court to give effect to the NLRA in situations where a Chapter XI employer continues in operation. Where an employer receives the benefits he bargained for earlier, he should be held to his bargain. If he desires to make changes, he should be required to bargain anew.

B. In Order To Safeguard Employees' Rights And Safeguard Against Unwarranted Rejections Of A Labor Contract, A Labor Contract Should Not Be Terminated By A Bankruptcy Court Unless A Debtor-In-Possession Can Demonstrate That Otherwise Its Operations Would Cease.

Under the *Bildisco* test and facts, there are virtually no situations which would not justify the rejection of a collective bargaining agreement by an employer. Presumably, any employer could show, as the employer in *Bildisco* claimed, that money could be saved by rejection of a collective bargaining agreement. This is especially true in times of high unemployment.

The UMWA submits that, before employees should be forced to give up benefits which are an integral part of

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term without resort to the section's specific requirements for notice and bargaining.

their survival, the employer should be forced to justify that he is unable to survive without the employees giving up such benefits. Otherwise, the UMWA fears that the employer's labor contract will be the prime contract selected from among its many contracts for termination whenever the employer experiences economic troubles or decides he wants to be rid of any labor organization.

In addition, the Union fears that the bankruptcy court judge will be able to continue to reject labor contracts based in many instances on hastily drawn conclusory assertions. These fears are amply demonstrated by the facts of the instant case, where the employer candidly told the bankruptcy judge that he made an inquiry into the labor market in this area and determined that there were "non-union employees available" to replace his higher-paid union employees. (Jt. App. 59) The judge, in permitting the labor contract's rejection, determined that he need look no further. "I would assume," the Judge stated, "a good reason for . . . the court approving rejection is the fact that *the debtor apparently feels he can do without the union contract* and save . . . approximately $100,000 a year. Now if that isn't a good reason for the debtor coming in and saying I want to reject the contract, I don't know what would be a good reason." (Jt. App. 74)

It does not appear from the record that it occurred to the judge that the employer should have to consider other alternatives to the rejection of the labor contract. And without the adoption of a strict standard for rejection of such contracts, the employer will never have to consider such alternatives.

CONCLUSION

An employer in a reorganization bankruptcy proceeding is bound to the terms of its collective bargaining agreement unless and until it has complied with Section 8(d) of the NLRA and unless and until authority to reject the agreement has been granted by the bankruptcy court on a showing that the employer would, of necessity, cease operations without rejection.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Amicus Curiae Brief was served by first-class mail, postage prepaid, this 6th day of May, 1983, on the following persons:

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No. 82-818-CFX
Status: GRANTED

Title: National Labor Relations Board, Petitioner
v.
Bildisco and Bildisco, Debtor-In-Possession, et al.

Docketed:
November 15, 1982

Court: United States Court of Appeals
for the Third Circuit

Vide:
82-852

Counsel for petitioner: Solicitor General

Counsel for respondent: Zackin, Jack M., Zazzali, James R.

Entry	Date	Note	Proceedings and Orders
1	Sep 2 1982		Application for extension of time to file petition and order granting same until October 17, 1982 (Brennan, September 3, 1982).
2	Oct 4 1982		Application for further extension of time to file petition and order granting same until November 14, 1982 (Brennan, October 5, 1982).
3	Nov 15 1982	G	Petition for writ of certiorari filed.
4	Dec 10 1982		Brief of respondent Bildisco & Bildisco in opposition filed. VIDED.
5	Dec 15 1982		DISTRIBUTED. January 7, 1983
7	Jan 10 1983		REDISTRIBUTED. January 14, 1983
9	Jan 17 1983		Petition GRANTED. The case is consolidated with 82-852 and a total of one hour is allotted for oral argument.
			**********
11	Feb 23 1983		Order extending time to file brief of petitioner on the merits until April 18, 1983.
12	Apr 5 1983		Order further extending time to file brief of petitioner on the merits until May 6, 1983.
13	Apr 14 1983		Joint appendix filed. VIDED.
14	Apr 26 1983		Record filed.
15	Apr 29 1983		Record filed.
16	Apr 29 1983		Certified copy of appendix and partial proceedings received.
17	May 9 1983		Brief of petitioner Local Union No. 408, I.B.T. filed. VIDED.
18	May 6 1983		Brief of petitioner NLRB filed. VIDED.
19	May 6 1983	G	Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as amicus curiae filed.
20	May 6 1983	G	Motion of United Mine Workers of America, International Union for leave to file a brief as amicus curiae filed.
21	May 6 1983	G	Motion of International Brotherhood of Teamsters for leave to file a brief as amicus curiae filed.
22	May 20 1983	G	Motion of the Solicitor General for divided argument filed.
23	May 20 1983	G	Motion of petitioner in No. 82-852 for divided argument filed.
24	May 25 1983		Application for leave to exceed page limits on respondents' brief on the merits filed with WJB (A-953).
25	Mar 26 1983		Order granting same not to exceed 60 pages by Brennan, J.

No. 82-818-CFX

Entry	Date	Note	Proceedings and Orders
26	May 31 1983		Motion of United Mine Workers of America, International Union for leave to file a brief as amicus curiae GRANTED.
27	May 31 1983		Motion of International Brotherhood of Teamsters for leave to file a brief as amicus curiae GRANTED.
29	May 26 1983		Order extending time to file brief of respondent on the merits until July 8, 1983.
30	Jun 13 1983		Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as amicus curiae GRANTED.
31	Jun 13 1983		Motion of the Solicitor General for divided argument GRANTED. and a total of fifteen minutes is allotted for oral argument.
32	Jun 13 1983		Motion of petitioner in No. 82-852 for divided argument GRANTED. and a total of fifteen minutes is allotted for oral argument. The request of petitioner in No. 82-852 for additional time for oral argument is denied.
33	Jul 8 1983		Brief of respondent Bildisco & Bildisco filed. VIDED.
34	Jul 8 1983		Brief amicus curiae of Chamber of Commerce of the U.S. filed. VIDED.
35	Aug 2 1983		CIRCULATED.
36	Aug 15 1983		SET FOR ARGUMENT. Tuesday, October 11, 1983. (2nd case) This case is consolidated with No. 82-852. (1 hr.)
37	Sep 22 1983	X	Reply brief of petitioner NLRB filed. VIDED.
38	Sep 23 1983		Lodging received.
39	Sep 22 1983		Lodging, 11 copies, filed. To be returned to the Dept. of Justice.
40	Oct 5 1983	D	Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a supplemental brief as amicus curiae filed.
41	Oct 11 1983		ARGUED.
42	Oct 17 1983		Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a supplemental brief as amicus curiae DENIED.